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In the

Supreme Court of the United States

October Term, 1985

JULIA ELIZA GRIFFIN
Petitioner,
v.
STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS; DANIEL J. RYAN, Individually and in his former capacity as Director of Public Works; **FRANK M. O'DONNELL,** Individually and in his former capacity as Chief of the Division of Harbors and Rivers; **HENRY ISE,** Individually and in his former capacity as Chief of the Division of Harbors and Rivers; **EDWARD C. HAYES, JR.,** Individually and in his former capacity as Director of the Department of Natural Resources; **DENNIS J. MURPHY, JR.,** Individually and in his former capacity as Director of the Department of Natural Resources; **WILLIAM W. HARSH,** Individually and in his former capacity as Director of the Department of Environmental Management; **WENDALL J. FLANDERS,** Individually and in his capacity as Director of Transportation; and **W. EDWARD WOOD,** Individually and in his capacity as Director of the Department of Environmental Management
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. Where plaintiff's §1983 claim was not litigated in state court action in which plaintiff alleged the fraudulent condemnation of her land, and wherein the preclusionary effect of res judicata bars relitigation of the same cause of action between the same parties, is plaintiff who brought suit in the federal court under §1983, et seq. during pendency of her state court action, barred by res judicata from proceeding to trial in federal court?

II. Is the reservation rule where plaintiff, in writing, informs the state court of her intention to return to the federal court on her federal claims if necessary following litigation of her state claims as set out in England vs Louisiana State Board of Medical Examiners, 375 US 411, (1964) applicable to §1983 claim which was not litigated in the state court?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Julia Eliza Griffin, of South Kingstown, Rhode Island, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit rendered in these proceedings on April 16, 1985.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit, as yet unreported, appears at Appendix A hereof, pp. A-1 to A-8. The opinion of the United States District Court for the District of Rhode Island, July 30, 1984, appears at Appendix B hereof, pp. A-9 to A-37. The opinion of the Magistrate of the United States District Court for the District of Rhode Island, March 23, 1984, appears at Appendix C hereof, pp. A-38 to A-72. The decision of the United States District Court for the District of Rhode Island of May 18, 1982, appears at Appendix D hereof,

pp. A-73 to A-101. The Recommendation of the Magistrate of the United States District Court for the District of Rhode Island, November 20, 1981, appears at Appendix E hereof, pp. A-102 to A-108. Opinion of the Rhode Island Supreme Court, reported in 463 A.2d 1349, appears at Appendix F, pp. A-109 to A-139.

JURISDICTION

The judgment of the Court of Appeals was rendered on April 16, 1985. This petition is filed within 90 days of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

U.S. SUPREME COURT DECISIONS INVOLVED

1. Migra v Warren City School District Board of Education, 465 US 75, 79 L Ed 2d 56, 104 S.Ct. 892 (1984): Pertinent text:

104 S.Ct. page 896:
"It is now settled that a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."

Page 897:
"Section 1983 creates a new federal cause of action."

Page 898:
"In the present litigation, petitioner does not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court. Alternatively, petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court. (footnote 7) Section 1983, however, does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims. We hold, therefore, that petitioner's state-court judgment in this litigation has the same claim preclusive effect in federal court that the judgment would have in the Ohio state courts."

Footnote 7, page 898:
"In the event that a §1983 plaintiff's federal and state law claims are sufficiently intertwined that the federal court abstains from passing on the federal claims without first allowing the state court to address the state law issues, the plaintiff can preserve his right to a

federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court. See, e.g., England v Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

2. England v Louisiana State Board of Medical Examiners, 375 U.S. 411, 74 S.Ct. 461, 11 L.Ed. 2d 440 (1964):

Pertinent text:

11 L ed 2d page 447:
"We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then--whether or not he seeks direct review of the state decision in this Court--he has elected to forgo his right to return to the District Court."

11 L ed 2d page 448:
".... a party may readily forestall any conclusion that he has elected not to return to the District Court. He may accomplish this by making on the state record the "reservation to the disposition of the entire case by the state courts" that we referred to in Button. That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with Windsor, and that he intends, should the state

> courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. Such an explicit reservation is not indispensable; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state courts. When the reservation has been made, however, his right to return will in all events be preserved."

STATEMENT OF CASE

Plaintiff in 1973, and 1974, commenced two actions in Rhode Island Superior Court alleging that her condemned land was not being used for public purposes, and that she was denied her right to lease or repurchase her condemned properties under Article XVII of the Amendments to the Rhode Island Constitution. A decision adverse to plaintiff was rendered on June 15, 1979. Plaintiff appealed to the Rhode Island Supreme Court and then filed this suit in the United States District Court for the

District of Rhode Island contending that the State of Rhode Island's condemnation of plaintiff's land and its subsequent use for private purposes violated plaintiff's civil rights under Title 42 §§1981, 1982, 1983 and 1985 (3) of the United States Code, and plaintiff's First, Fifth and Fourteenth Amendment rights under the Constitution of the United States.

Plaintiff's counsel prior to September, 1981, in conference, informed an Associate Justice of the Rhode Island Supreme Court, that suit was pending in the United States District Court wherein plaintiff's federal claims were to be litigated. As a result thereof, the state filed a motion to dismiss this federal action on September 5, 1981.

The motion to dismiss was heard on November 20, 1981, by Magistrate Hagopian who recommended (Magistrate's Recommenda-

tion 11/20/81, Appendix E) that plaintiff was entitled to a trial in the federal court but that abstention should be adopted, setting forth:

> "In order to ensure that that plaintiff will have a full hearing on the federal constitutional issues if necessary, this Court should retain jurisdiction pending the State court proceedings."
>
> "Accordingly, the State of Rhode Island's motion to dismiss the complaint should be denied." (Appendix E)

Plaintiff appealed the Magistrate's recommendation as to the adoption of the doctrine of abstention, which came on to be heard before Chief Judge Boyle on May 19, 1982, wherein Judge Boyle held that res judicata and abstention did not apply, however he reached the same conclusion as the magistrate, denied the defendant's motion to dismiss, deferring action on plaintiff's case until the Rhode Island Supreme Court filed its opinion. (Judge Boyle's decision, page 18, Appendix D).

Plaintiff in reliance on Judge Boyle's decision of May 19, 1982, neither briefed nor argued any federal statutory or constitutional claims before the Rhode Island Supreme Court, and plaintiff's federal statutory and constitutional claims were not decided by the Rhode Island Supreme Court.

Plaintiff in her state reply brief raised only one Federal Constitutional question, which concerned Article XVII of the Amendments to the Rhode Island Constitution, a matter of Rhode Island law which had to be interpreted by the Rhode Island Supreme Court.

Any other Federal cases cited in plaintiff's brief, were solely for legal propositions such as the "adequacy of consideration", "meeting of the minds", "vested rights", etc., but were in no way cited as authority for §1983 violations or Articles V and XIV of the Amendments to the United States Constitution.

Plaintiff in March, 1983, notified the Rhode Island Supreme Court in writing as follows:

> "2. This matter is of great importance to plaintiff as well as the defendants, and the decision of this Supreme Court also has a bearing on the suit that plaintiff has pending in the United States District Court for the District of Rhode Island. Trial in the Federal Court has been deferred, pending the decision of this Supreme Court, as this Court's decision will be a determining factor in what issues will have to be decided by the Federal Court."

Plaintiff would concede that the language of her written reservation was not the most artful, however, there appears to be no magic formula or language necessary for such a reservation, the basic requirement being that plaintiff inform the state supreme court of her intent to return to the federal court to litigate her federal claims if necessary.

Plaintiff would also concede that at the time she notified the state supreme court of her intent to return to the fed-

eral court, she was not even aware of the reservation rule of England v Louisiana State Board of Medical Examiners, (375 U.S. 411, 74 S.Ct. 461, 11 L.Ed. 2d 440 [1964]) and simply felt that the Rhode Island Supreme Court should be aware as a matter of record and courtesy of the pendency of her federal action, and plaintiff's intent to return to the federal court, with the hope that the state court would not decide the federal issues sua sponte.

The Rhode Island Supreme Court on August 4, 1983, rendered its decision, wherein they ASSUMED and held that the release and deed which the state required the plaintiff to execute as a necessary precondition to payment for her condemned land, were valid and sufficient to dismiss plaintiff's action. (Griffin v Bendick, [RI 1983] 463 A.2d 1349)(Appendix F)

Defendant then filed a second motion to dismiss in the United States District Court, alleging res judicata.

This motion was heard by Magistrate Hagopian, who on March 23, 1984, rendered a written decision (Appendix C) denying defendant's motion to dismiss, finding:

> 1. That the Federal Court had land jurisdiction over plaintiff's case;
>
> 2. That plaintiff's claim was not barred by the statute of limitations;
>
> 3. That the doctrine of laches did not prevent plaintiff from maintaining this action;
>
> 4. That the release executed by plaintiff was no bar to this action.
>
> 5. That the doctrine of res judicata and collateral estoppel did not bar plaintiff's action in this federal court.
>
> 6. That plaintiff Griffin had specifically elected to litigate her §1983 claim in a federal forum and should be allowed to do so. (Magistrate Hagopian's Recommendation, Appendix C).

Magistrate Hagopian, after citing the reservation rule of England vs Louisiana, supra, cited with approval in Migra v Warren City School District Board of Education, ([1984] 465 US 75, 79 L Ed 2d 56, 104 S.Ct. 892) at page 898, note 7, held that plaintiff had complied with the reservation rule and continued:

> "This is precisely the posture of this case. As I stated in my prior Report and Recommendation in this case of November 20, 1981, at page 4: (Appendix E)
>
> In order to ensure that plaintiff will have a full hearing on the federal constitutional issues if necessary, this Court should retain jurisdiction pending the state court proceedings." (This recommendation was adopted by Judge Boyle on May 19, 1982.)

The Magistrate then recommended that the defendant's motion to dismiss be denied. (Appendix C pg A-70).

Defendant appealed the Magistrate's Recommendation to Judge Boyle, who issued his opinion of July 30, 1984, granting defendant's motion to dismiss holding that the

preclusionary effect of res judicata under Rhode Island law is to bar a suit between the same parties concerning "the same operative nucleus of fact. . ." as that in the first action (Judge Boyle's Decision, Appendix B pg. A-9 to A-37) and thus plaintiff's claim in the federal court was barred by res judicata.

Plaintiff appealed to the Circuit Court of Appeals for the First Circuit contending that the preclusionary effect of res judicata under Rhode Island Law barred relitigation of the same cause of action between the same parties and that plaintiff's federal action §1983 et seq. and the fifth and fourteenth amendments were not the same cause of action that plaintiff had litigated in the state court. Secondly, plaintiff contended that she had reserved her right to a federal forum by notifying the Rhode Island Supreme Court orally and in writing of her intention to return to the

federal court if necessary following the litigation of her state court claims.

The First Circuit Court of Appeals by decision of Circuit Judge Torruella dated April 16, 1985, found that plaintiff's suit in the federal court was barred by res judicata, and that the reservation rule of England vs Louisiana State Board of Medical Examiners, supra, did not apply. (Torruella's Decision, Appendix A).

REASONS FOR GRANTING THE WRIT

The United States Circuit Court of Appeals for the First Circuit has decided a federal question in a way in conflict with applicable decisions of this Supreme Court. (United States Supreme Court Rules, Rule 17.1(c)).

Question 1:

Where plaintiff's §1983 claim was not litigated in state court action in which plaintiff alleged the fraudulent condemnation of her land,

> and wherein the preclusionary effect of res judicata bars relitigation of the same cause of action between the same parties, is plaintiff who brought suit in the federal court under §1983, et seq. during pendency of her state court action, barred by res judicata from proceeding to trial in federal court.

Migra v Warren City School District Board of Education, supra, sets out very clearly, that res judicata in the federal court shall be given the same preclusionary effect as it would be given in the state court where the action occurs.

Judge Torruella at page 4 reversed Judge Boyle holding that

> "In Rhode Island, the doctrine of res judicata operates as an absolute bar to the relitigation of the same cause of action between the same parties, when a final judgment has been rendered on the merits. Corrado v Providence Redevelopment Agency, 320 A.2d 331, 332 (R.I. 1974). Under this doctrine, a judgment rendered on the merits in the first case is conclusive not only as to the issues that were actually raised and determined, but also as to all matters that could have been raised and determined. Perez v Pawtucket Redevelopment Agency, 302 A.2d 785, 790 (R.I. 1973)."

Both **Corrado** and **Perez** in referring to "all matters that could have been raised and determined", are referring to the matters that could have been raised in the **cause of action** being litigated.

Judge Torruella continued at page 5:

> "* * * Accordingly, the issues appellant now seeks to raise in federal court were unquestionably raised, **or could easily have been raised**, in the proceedings that took place in the courts of Rhode Island." (emphasis mine)
>
> "Having lost there, appellant seeks to make § 1983 a vehicle for relitigating matters that were put before the consideration of state courts. This she may not do. **By forcing plaintiffs to bring related claims as part of a single cause of action**, res judicata prevents needless and duplicative litigation. * * *" (emphasis added)

Plaintiff submits that this is not the teaching of Migra v Warren City School District Board of Education, supra. The question posed by Migra, is whether or not there were distinct causes of action and if one were brought in the state court,

plaintiff would be entitled to a trial in federal court on the second cause of action.

Judge Torruella, not recognizing that §1983 constitutes a new federal cause of action (Migra v Warren City School District Board of Education, supra), then went on to find that plaintiff's federal suit was "essentially" the same cause of action as her state suit.

Judge Torruella cited Isaac v Swartz, 706 F.2d 15, (1st Cir. 1983) on page 4 of his decision, which adopted the common nucleus of fact theory for the preclusionary effect of res judicata. This is not the teaching of Migra.

Thus, plaintiff submits that her suit in the state court was for the fraudulent condemnation of her property under state law. Plaintiff's suit in the federal court was under 42 USC §§ 1983, et seq., and the fifth and fourteenth amendments to the

United States Constitution, and should not have been barred as thev are separate and distinct causes of action.

It is significant to note that Dr. Migra brought suit in the Ohio State courts on two causes of action. The court ordered Dr. Migra reinstated to her employment, and she then moved to dismiss without prejudice "the issue of conspiracy and individual board member liability". **Subsequent** thereto, Dr. Migra filed an action in the federal district court under the first, fifth, and fourteenth amendments, and 42 USC §1983 and 1985, and conceded that she could have raised her §1983, fifth and fourteenth amendment Constitutional claims in the state court but did not. This Supreme Court held at page 897, "that §1983 creates a new federal cause of action. This Supreme Court continued at page 898

"in the present litigation, petitioner

> would not have adjudicated her federal claims had she presented them in her original suit in state court."

This Supreme Court then held that if the preclusionary effect of res judicata under Ohio law barred relitigation of the same cause of action between the same parties, Dr. Migra would be entitled to a trial in the federal court, as §1983 is a distinct cause of action.

Thus, Judge Torruella's interpretation of Migra v Warren City School District Board of Education, supra, that issues that could have been raised in the state court, should have been raised, and that Migra forced plaintiffs to bring related causes of action as part of a single claim and thus prevent needless and duplicative litigation, is erroneous. This is not the holding of Migra, and thus the Circuit Court of Appeals did not follow this Court's teachings and instructions therein.

Question 2

Is the reservation rule where plaintiff, in writing, informs the state court of her intention to return to the federal court on her federal claims if necessary following litigation of her state claims as set forth in England vs Louisiana State Board of Medical Examiners, 375 US 411, (1964), applicable to §1983 claim which was not litigated in the state court?

Judge Torruella in footnote 1 on page 3 of his decision sets forth:

> "Griffin (plaintiff) argues that the federal constitutional issues were not raised in the state proceedings, but rather were reserved under England v Louisiana State Board of Medical Examiners, 378 U.S. 411 (1964). The rule laid down in England is not applicable to this case. Section 1983 does not override state preclusion law by allowing plaintiffs to first proceed to judgment in state courts and then turn to federal courts for adjudication of federal claims. See Migra v Warren City School District Board of Education, infra at 698. Thus plaintiff's argument re England is meritless."

Migra did say that §1983 does not override state preclusion law, however, Migra went on in footnote 7, at page 898, to set forth:

> "In the event that a §1983 plaintiff's federal and state law claims are sufficiently intertwined that the federal court abstains from passing on the federal claims without first allowing the state court to address the state law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court. See,e.g., England v Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). (Emphasis added) Migra, supra, at 898, n.7."

There is no question here that plaintiff's §1983, fifth and fourteenth constitutional amendment claims are intertwined with her claims of fraudulent condemnation which were tried in the state court. Plaintiff reserved her right to return to the federal court by informing the state court of her intention to so do.

> "When the reservation has been made, however, his right to return will in all events be preserved." (England v Louisianna State Board of Medical Examiners, supra, 11 L ed at 449; and Migra v Warren City School District Board of Education, supra.)

Thus, Judge Torruella's holding that the reservation rule of England does not apply to plaintiff's §1983 claims, is error and is not consistent with the decisions of this Supreme Court.

CONCLUSION

Therefore, the United States Circuit Court of Appeals for the First Circuit having decided federal questions in a way in conflict with applicable decisions of this Supreme Court, Petitioner respectfully moves that her petition for writ of certiorari be granted by this Honorable Supreme Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1715

JULIA ELIZA GRIFFIN,

Plaintiff, Appellant,

v.

STATE OF RHODE ISLAND, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND
(Hon. Francis J. Boyle,
U.S. District Judge)

Before

Breyer, Aldrich and Torruella,

Circuit Judges.

Norman L. Grant for appellant.
Charles C. McKinley for appellees.

April 16, 1985

TORRUELLA, Circuit Judge. The sole issue here is whether principles of res judicata bar the plaintiff/appellant's federal court action. We believe that they do and thus affirm the district court's dismissal of the case.

Plaintiff/appellant Julia E. Griffin brought an action under 42 U.S.C. 1983 attacking the condemnation of several parcels of her real estate by the State of Rhode Island. The state took the parcels, for which Griffin received compensation in two sets of condemnation proceedings that took place in 1946 and in 1962.

In response to the 1946 condemnations, Griffin brought three separate actions in Rhode Island Superior Court for an assessment of damages against the state. In 1948 after extended negotiations the state agreed to pay Griffin $80,100 for her land, in exchange for a general release of all claims arising from the takings and

the execution of a quit claim deed to the state. The state condemned a final parcel owned by the plaintiff in 1962.

More than ten years later, in 1973 and 1974, Griffin filed separate actions in the Rhode Island Superior Court attacking the condemnations. She alleged that these lacked a public purpose and that they had been unreasonable. arbitrary, capricious, and in bad faith, all in violation of the fifth and fourteenth amendments to the Constitution of the United States. She also alleged violations of state constitutional and statutory provisions. In addition, she asked that the statute pursuant to which her property was taken be declared unconstitutional under both federal and state constitutions. Griffin further asked that she be revested with title to the properties, that the state be required to account for all income that had flowed from its ownership of the properties, and for damages. The actions

were consolidated and thereafter, in 1979, a state superior court rendered a decision in favor of the state. Griffin appealed that decision to the state supreme court.

While that appeal was pending, she filed and action pursuant to 42 U.S.C. 1983 in the United States District Court for Rhode Island raising the same federal constitutional issue that had been raised in her state complaints.[1] The district court deferred action pending the state supreme court's decision. The Rhode Island Supreme Court denied plaintiff's appeal in its entirety. Griffin v. Bendick, 463 A.2d 1340 (R.I. 1983). Thereafter, the district court dismissed the complaint in res judicata grounds. This appeal followed.

It is hornbook law that the principals of res judicata apply in 1983 actions. See Allen v. McCurry, 449 U.S. 90 (1980); Isaac v. Schwartz, 706 F.2d 15 (1st Cir. 1983). In 1983 actions,

federal courts must give state court judgements the same res judicata effect as is prescribed by the state law wherein the action rises. Migra v. Warren City School District, 104 S.Ct. 892, 898 (1974). In Rhode Island, the doctrine res judicata operates as an absolute bar to the relitigation of the same cause of action between the same parties, when a final judgement has been rendered on the merits. Corrado v. Providence Redevelopment Agency, 320 A.2d 331, 332 (R.I. 1974). Under this doctrine, a judgment rendered on the merits in the first case is conclusive not only as to the issues that were actually raised and determined, but also as to all matters that could have been raised and determined. Perez v. Pawtucket Redevelopment Agency, 302 A.2d 785, 790 (R.I. 1973). In order for res judicata to bar a cause of action in Rhode Island, there must be (1)identity of parties, (2) identity of issues, and (3) finality of

judgement. Hebert v. Ventetuolo, 480 A.2d 403, 405 (R.I. 1984).

There is no dispute in this appeal concerning the identical nature of the parties and of the entry of a valid final judgement against appellant in the state courts. However, appellant contends that the "causes of action" in Rhode Island and federal courts differed, and thus argues that res judicata does not bar her federal court action. We disagree. An analysis of the cause of action here and in the prior state proceedings clearly establishes that both are essentially the same. Indeed, appellant has alleged no facts in the federal court which would differentiate the state and federal court actions. She has also alleged in each case the same relationship between the parties. Moreover, both the state and federal court actions involve the same subject matter, arise out of the same occurrences, and rest on the same common contention that the

condemnations in question lacked a public purpose and, therefore, deprived Griffin of her property in violation of the guarantees established in the Constitution. See Corrado v. Providence Redevelopment Agency, supra at 333. Accordingly, the issues appellant now seeks to raise in federal court were unquestionably raised, or could easily have been raised, in the proceedings that took place in the courts of Rhode Island.

Having lost there, appellant seeks to make 1983 a vehicle for relitigating matters that were put before the consideration of state courts. This she may not do. By forcing plaintiffs to bring related claims as part of a single cause of action, res judicata prevents needless and duplicative litigation. 18 J. Moore, J. Lucas, T. Currier, Moore's Federal Practice 0.410[2] (2d ed. 1983).

Public policy and orderly procedures dictate that all disputes come to an end at

some point after exhausting available remedies. With a record of litigation of these matters and issues dating back to 1946, it is clear that they have been litigated to exhaustion. It is time for a rest.

The judgement of the district court dismissing this case on grounds or res judicata is affirmed.

Affirmed.

FOOTNOTES

1. Griffin argues that the federal constitutional issues were not raised in the state proceedings, but rather were reserved under England v. Louisiana State Board of Medical Examiners, 378 U.S. 411 (1964). The rule laid down in England is not applicable to this case. Section 1983 does not override state preclusion law by allowing plaintiffs to first proceed to judgement in state courts and then turn to federal courts for adjudication of federal claims. See Migra v. Warren City School District Board of Education, infra at 698. Thus plaintiff's argument re England is meritless.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

JULIA ELIZA GRIFFIN	:	
	:	
vs.	:	C.A. NO. 79-0635B
	:	
STATE OF RHODE ISLAND ET AL.	:	

OPINION

BOYLE, Francis J., Chief Judge.

Plaintiff has brought this action pursuant to 42 U.S.C. 1983 attacking the condemnation of several parcels of her real estate by the state of Rhode Island. Because the events upon which this controversy centers date back to 1946, a detailed explanation of the facts is necessary.

On March 27, May 23 and August 22, 1946 the state of Rhode Island condemned three parcels of plaintiff's land located in the towns of Galilee and Jerusalem, Rhode Island. After the condemnations Plaintiff filed three petitions for

damages. The petition on the March 27, 1946 condemnation was reached for trial and the jury awarded Plaintiff $27,475. After the trial the state informed Plaintiff's attorney that it intended to appeal the verdict. Plaintiff decided that she could not afford to continue the litigation and instructed her attorney to settle the entire case; a settlement figure of $80,100 was agreed upon. On March 30, 1948 Plaintiff signed a quitclaim deed and release.

The portions of land condemned in 1946 were taken with a long range goal of developing a port facility. Since the taking of the state has constructed and repaired bulkheads and breakwaters, installed piers, roads and sewer systems. It has dredged the harbor and created a state beach. The land is used for the provision of auxiliary services to the commercial fishing fleet and other boaters. Part of the land is used by the University

of Rhode Island and the Division of Fish and Wildlife. Portions of the land are leased by retail establishments. These retail businesses include restaurants, stores and a hotel (The Dutch Inn). The use to which the land has been put is detailed in Griffin v. Bendick, ___ R.I. ___, 463 A.2d 1340, 1343 (1983).

On April 19, 1962 the state condemned a portion of Plaintiff"s land located in Little Comfort, Rhode Island. Although the land has not yet been developed, the state intends to construct a pleasure craft marina on the site.

In 1973 and 1974 Plaintiff filed separate actions attacking the condemnations in the Rhode Island superior court. In her complaint Plaintiff alleged violations of the federal and Rhode Island constitutions. She alleged that the taking was not for a public purpose or that, alternatively, it was arbitrary, capricious and in bad faith, all in violation of the Fifth and

Fourteenth Amendments of the United States Constitution. She asked that the statute pursuant to which her property was taken be declared unconstitutional under the federal and state constitutions. Plaintiff also asked that she be declared vested of fee simple title of the land, that all leases of the land be declared invalid, that she receive an accounting of all monies the state had received from the leases and that the state be ordered to sell her the land.

The cases were consolidated and tried in November of 1978 by a judge sitting without a jury. The trial judge filed a written opinion on June 15, 1979. In his opinion the judge refused to entertain the Plaintiff's constitutional attack on the statute pursuant to which the condemnations had occurred. He pointed out that Plaintiff has based her 1946 action on on the statute which authorized the condemnations and that as a matter of state law should could not now attack it. Judge

Bourcier also held that the Plaintiff was estopped from attacking the statute, since the issue could not have been raised in the 1946 lawsuit. While not mentioning the statute of limitations or laches by name he stated,

> There is no legal authority any where, that would support a delayed claim, such a Plaintiff now makes, twenty-seven years after the time when she had full opportunity to do what she now seeks to do.

Slip op. C.A. No. 73-57, p. 11 (R.I. June 15, 1983). He later also noted that the issue could not be raised twenty-five years after settlement. The judge also held that the Plaintiff had waived her rights by negotiating a settlement with the state. In this context he held that there was sufficient consideration for the quitclaim deed and release and that both were valid. Judge Bourcier also found that the state did not act unreasonably in condemning the amount of land taken and that the leases of the land to private interests were only incidental to the public purpose behind the

taking. He ruled that the statute under which the 1962 condemnation was transacted violated the Plaintiff's right to preemption under the Rhode Island Constitution and that should the state decide to dispose of rather than develop the land, the plaintiff should be given the opportunity to acquire it.

Plaintiff appealed the decision to the Rhode Island supreme court. While the appeal was pending she filed the action presently before this Court. The complaint raised the same federal constitutional issues as those raised in her state complaint. This court stayed the action pending the Rhode Island supreme court's decision.

The Rhode Island supreme court issued its decision on August 4, 1983. Griffin v. Bendick, supra. Preliminarily it held that the quitclaim deed and release were valid and would ordinarily be complete bar to the Plaintiff's action. It decided,

however to reach several of the Plaintiff's constitutional contentions

> because of certain rulings made by the trial justice and their effect upon the 1962 condemnation, their impact on pending lawsuits, and the great weight and importance that we ascribe to these issues.

Griffin v. Bendick, supra at 1345-1346. Justice Kelleher, writing for this court, then affirmed the trial judge's decision on all issues other than the constitutionality of the state statute.

After the supreme court had issued its decision the defendants moved in this court for summary judgment of for judgment on the pleadings.[1] The magistrate recommended pursuant to 28 U.S.C. § 636(b)(1)(B) that the Defendant's motion be denied. Defendants made a timely objection to the Report and Recommendation and the matter is now properly before this Court. Because it finds that the Plaintiff's claims are barred by res judicata the Court does not consider the other grounds for the Defendant's motions.[2]

Even in the context of 1983 actions res judicata raises a bar to relitigation in federal court of issues which were either raised or litigated or which could have been raised in state court. Migra v. Warren City School District Board of Education, ____U.S.____, 104 S.Ct. 892 (1984); Allen v. McCurry, 449 U.S. 90 (1980); Isaac v. Schwartz, 706 F. 2d 15 (1st Cir. 1983); Shiavulli v. Aubin, 504 F.Supp. 483 (D.R.I. 1980). The Plaintiff relies on Lombard v. Board of Education, 502 F.2d 631 (2d Cir. 1974) For the proposition that res judicata should not bar litigation in a 1983 action of a constitutional issue not raised in the course of a state court action. In Lombard, the appeals court, relying on what it believed to be the policy considerations behind 1983, refused to preclude the Plaintiff from litigating in federal court a Fourteenth Amendment claim which he could have but did not raise in

the state court. The continued vitality of Lombard is doubtful, however, in light of the Supreme Court's recent decision in Migra, where Justice Blackmun, writing for the majority, stated,

> Section 1983, ... does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims.

Migra, supra, at 898. Justice Blackmun stated that there was no policy justification for the distinguishing in the context of a 1983 action between "the issue preclusive and claim preclusive effects of state court judgments." Migra, supra at 897. Even if Lombard continues to be good law, its approach is at variance with that of the First Circuit, which has consistently applied res judicata as a bar to litigation of issues which could have been raised in the course of the state proceeding. Isaac v. Schwartz, 706 F.2d 15 (1st Cir. 1983) (cited by Justice

Blackmun in Migra); Ramirez Pluguez v. Cole, 571 F.2d 70, 71 (1st Cir. 1978); Lovely v. Laliberte, 498 F.2d 1261, 1263-64 (1st Cir.), cert. denied, 419 U.S. 1038 (1974); Schiavulli v. Aubin, supra, at 486, n.2. Therefore, res judicata is clearly a bar to litigation of issues which the plaintiff could have raised in state court, cf. Perez v. Pawtucket Redevelopment Agency, 111 R.I. 327, 302 A.2d 785 (1973).

To decide whether res judicata bars the Plaintiff's action, the Court must decide whether traditional criteria have been met. The issues are: 1) whether the actions involve the same parties or their privies, 2) whether the actions involve the same cause of action, and 3) whether a court of competent jurisdiction has entered a decision on the merits in the first action. Schiavulli v. Aubin, supra. In making this decision, The Court must give the state court decision the preclusive

effect it would be given under Rhode Island law. Migra, supra.

The parties in this action are the same as in state court and the first hurdle toward finding of res judicata is easily cleared. The controversy here centers on the question whether the actions arise out of the 'same cause of action.' There also appears, at least in the Plaintiff's mind, to be a question whether the decision rendered by the state court is a final judgment.

Plaintiff argues that her state and federal claims are two separate causes of action under Rhode Island law and that she therefore should not be precluded from raising her federal claims in this Court. The inconsistency of the use of terminology in this context of res judicata analysis has resulted in wide spread confusion over what is meant by the term 'cause of action' and what is therefore barred by res judicata. See Migra, supra, at 894,

n.1. The Rhode Island supreme court itself has used a bevy of terms was addressing the issue of res judicata. In Zalobowski v. New England Teamsters and Trucking Industry Pension Fund, ___ R.I. ___, 410 A.2d 436 (1980) the court referred to 'claims.' In Perez v. Pawtucket Redevelopment Agency, supra, it used the terms 'issue' and 'cause of action.' The term 'matter' was used in Air-Lite Products, Inc. v. Gilbane Building Company, 115 R.I. 410, 347 A.2d 623, 630 (1975). Thus the terminology used by the supreme court is not at all times the same. The decision whether res judicata creates a bar in the action, however, cannot be reduced to a matter of semantics. Rather the court must look beyond form to substance. Perez v. Pawtucket Redevelopment Agency, supra at 791. The question is whether the action concerns "the same operative nucleus of fact ..." as that in the first action. Lovely v. Laliberte, supra. That the

Rhode Island supreme court applies this type of analysis is clear from Corrado v. Providence Redevelopment Agency, 113 R.I. 274, 320 A.2d 331 (1974), a case also dealing with eminent domain. In Corrado, The Providence City Council approved a renewal project which called for the taking by eminent domain of the plaintiff's property. The plaintiffs commenced challenging the validity the proceeding wherein the plan had been adopted. They also argued the taking would serve no public purpose and sought an injunction. The court dismissed the action on the basis of the statute of limitations. After the court's decision the plaintiffs filed a second action naming the same parties and seeking identical relief. Their request for a preliminary injunction was denied on the basis od res judicata. One day after the hearing but three days before the court entered a written order, the city took the plaintiff's property. The plaintiffs filed

a supplemental complaint alleging violation of state and federal constitutions. Two years later the trial court sustained the defendant's plea of res judicata. The plaintiffs appealed to the supreme court. The court held that their action was barred by res judicata. In so doing Justice Joslin said of the actions,

> Both name the same parties, seek the same relief, involve the same subject matter, arise out of the same occurrences, and rest on the common contention that the proposed taking under the redevelopment plan would deprive the Corrados of their property without due process of law in violation of both the federal and state constitutions.
>
> There are admittedly some differences ... But these charges, like those advanced in the first suit, challenge the validity of the redevelopment plan and its adoption. They could have been raised in the prior suit.

Corrado, supra, at 333. Justice Joslin recognized the fact that the supplemental complaint was based on events which occured after the first complaint was filed. He found that the supplemental complaint was predicted upon the same allegations of

unfairness and constitutional infirmity as the original complaint and thus was also barred by res judicata. After Justice Joslin's analysis in Corrado there can be no question but that Rhode Island predicates a finding of res judicata on the existence of an operative nucleus of fact common to both actions. The plaintiff in this case has attacked the 1946 and 1952 condemnations in both the state and federal court actions. She has alleged no facts in the federal court which would differentiate the actions. Essentially the difference in the actions as seen from the faces of the complaints is that the Plaintiff raises only her arguments based on the federal constitution here. These federal arguments do not create, as the Plaintiff argues, a separate cause of action. They are based on the identical transactions which Plaintiff attacked in state court. Here as in Ramirez Pluguez v. Cole, supra, the Plaintiff is merely trying to alter her

theory of relief. This she cannot do at this late stage in the proceedings.

Plaintiff attempts to distinguish this case from Lovely v. Laliberte, supra, and Ramirez Pluguez v. Cole, supra. She seems to be raising an argument that the trial court's decision is not a final judgment as required for application of res judicata with her memorandum statement that "... these cases are not appropriate nor analogous to the case at bar in that each of them concerns a action brought in the federal court after the conclusion of their state court action." Plaintiff's Memorandum in Opposition to Defendant's Objection to Recommendation of Magistrate Hagopian dated March 23, 1984, p.27. There is a split of authority as to whether the pendency of an appeal affects res judicata. However, Rhode Island in 1973 decided to follow the majority view and does not allow the pendency of an appeal to prevent the application of res judicata,

Perez v. Pawtucket Redevelopment Agency, supra. Therefore the trial judge's decision is final judgment for the purposes of res judicata consideration.

The Plaintiff's action is barred unless she has, as she argues, reserved her federal claims for hearing by the federal court. Plaintiff claims that she informed the opposing parties, the supreme court and this Court that she wished the federal court to decide her federal complaints. Before argument the Plaintiff sent to the supreme court the following writing:

> 2. This matter is of great importance to plaintiff as well as the defendants, and the decision of this Supreme Court also has a bearing on the suit that plaintiff has pending in the United States District Court for the District of Rhode Island. Trial in the Federal Court has been deferred, pending the decision of this Supreme Court's decision will be a determining factor in what issues will have to be decided by the Federal Court.

Plaintiff claims that this notification was sufficient to reserve her federal claims. She also contends that she refused to brief

or argue her federal claims before the supreme court and that the supreme court did not rule upon them. In her brief before the Rhode Island Supreme court, however, the Plaintiff relied on both Rhode Island and federal law, and in her reply brief argued at length the application of the due process clause through the fifth and fourteenth amendments to the state's actions. The Rhode Island court, as noted supra, felt it important to reach the constitutional issues in the course of making its decision. The supreme court did not indicate whether it was resting its decision on the state or federal constitution. However, Justice Joslin, in deciding whether the condemnation was for a public purpose relied on the United States Supreme Court case of Berman v. Parker, 348 U.S. 26 (1954). Griffin v. Bendick, supra, at 1346. This indicates that the court based its decision at least in part on federal grounds.

A plaintiff has the right to reserve her federal claims for determination by the federal courts. See England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). On the other hand, she may also forego that right, NAACP v. Button, 371 U.S. 415 (1963). If a party unreservedly litigates federal rights in a state court when not required to do so, she waives her right to a federal court determination of her federal claims. England, supra; Government and Civic Employees Organizing Committee, CIO v. Windsor, 353 U.S. 364 (1957). Justice Blackmun indicated in Migra that a plaintiff can reserve federal claims by litigating first in a federal forum. Relying on England, he also noted that

> In the event that a 1983 plaintiff's federal and state law claims are sufficiently intertwined that the federal court abstains from passing on the federal claims without first allowing the state court to address the state law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court

> on his federal claims following litigation of his state claims in state court. (citation omitted)

Migra, supra, at 898, n.7.

One would also assume that the Plaintiff would be free to file simultaneous suits and alert the state courts to that fact or file first in state court, specifically reserving the right to litigate federal claims in a federal court. However, the Plaintiff has done neither. Rather, her tactic is reminiscent of the rider who seeks to change horses in midstream. Plaintiff did not file in federal court until she received a state court decision, a decision with which she was dissatisfied. Thus, when she filed her federal complaint Plaintiff had already received a judgment considered final under Rhode Island law. Her state court complaint raised a myriad of constitutional issues as well as state claims. She made no effort to reserve the federal issues before trial. It is too

late for her to come into federal court for resuscitation.

Although the federal courts are the final deciders of federal law, England, supra, the state courts are equally bound to uphold the constitution. Sylander v. New England Home for Little Wanderers, 584 F.2d 1103, 1108 (1st Cir. 1978); Schiavulli v. Aubin, supra. Plaintiff has not alleged that the state court was unwilling to adjudicate her federal rights. See Migra, supra, at 898. Furthermore, in Migra Justice Blackmun rejected the notion that separate forums are required for the adjudication of state and federal claims.

> [28 U.S.C. 1738] embodies the view that it is more important to give full faith and credit to state-court judgments than to insure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources.

Migra, supra, at 898.

Even if res judicata does not bar Plaintiff's action her case must nonetheless be dismissed since the state condemned her land for a public purpose. All four parcels of land were taken pursuant to the authority of Chapter 112 Section 27 of the Public Laws of 1938 as amended by Chapter 1650 of the Public Laws of 1945. Clause 1 reads,

> The Department of Public Works is hereby authorized to acquire in fee simple in the name of the state for the use and benefit of the public, by the purchase or condemnation or by lease from time to time, any portion of real property, tide-flowed lands, plats, terms, easements, privileges, foreshore, riparian and littoral rights of the owner or owners thereof, bordering on tidewater in the state and as much of the uplands adjacent thereto as the director of public works shall deem expedient.

This provision has been codified as U.S. Gen. Laws 46-5-1. The Rhode Island supreme court found that the underlying purposes of the law included " ...the improvement of navigation, promotion of the fishing industry, enhancement of recreation, and encouragement of tourism."

Griffin v. Bendick, supra at 1346. The Court also found that the development of the port generated millions of dollars in revenues and created hundreds of jobs. Plaintiff argues that, because some of the land has been rented to private enterprises the condemnations resulted in a benefit to private individuals and thus did not constitute a taking for public purposes. The United States Supreme Court recently addressed this issue in Hawaii Housing Authority v. Midkiff, 52 U.S.L.W. 4673 (May 30, 1984). That case concerned a Hawaiian act under which the Hawaii Housing Authority was allowed to condemn residential tracts and transfer them in fee simple to existing lessees. The act was passed in an effort to eradicate the effects of a long lasting feudal pattern of land ownership. The plaintiffs, owners resisting the condemnation of their land, averred that the condemnations were not for a public purpose. Justice O'Connor wrote

the opinion in which all justices who had heard the case had joined. Relying on Berman v. Parker, 348 U.S. 26 (1954), she stated that the scope of police power, which is the basis of eminent domain, and the 'public use' requirement are 'coterminous.' Hawaii Housing Authority, supra, at 4676. She quoted extensively from Berman v. Parker, supra in reaching this conclusion.

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.

Hawaii Housing Authority, supra, at 4676, quoting Berman v. Parker, supra, at 32.

> Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means by which it will be attained is also for Congress to determine.

Id., quoting Berman v. Parker, supra at 33. Since the scope of the police power, while not infinite, was very broad,

she reasoned, so was the 'public purpose' requirement. The court's role in reviewing a legislative determination of public purpose is very narrow; The legislature's determination of public purpose will not be disturbed unless it involves an 'impossibility.'

Justice O'Connor conceded that one person's property could not be taken for the benefit of another private person without first justifying a public purpose. However, she said,

> ... where the exercise of the eminent of domain power is rationally related to a conceivable public purpose, the court has never held a compensated taking to be proscribed by the Public Use Clause. (emphasis added).

Id. Therefore, the question this court must address is whether the condemnations served a public purpose, not whether private individuals have been tangentially benefited by the method of development the state has employed. As noted supra, the Rhode Island supreme court held that the development of the port facility

constituted a public purpose for purposes of the exercise of eminent domain power. This Court finds the Rhode Island court's conclusion a sensible one. The state has a strong interest in the development or preservation of its wetlands. Such areas are environmentally fragile and a complete plan for their use or non-use as envisioned by the state will ultimately inure to the benefit of the public.

Therefore, this Court finds that the condemnations of Plaintiff's land were for a public purpose. As Justice O'Connor stated in Hawaii Housing Authority, supra, at 4677.

> The court long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any considerable portion....directly enjoy or participate in any improvement in order [for it] to constitute a public use. Rindge Co. v. Los Angeles. 262 U.S., at 707. "[W]hat in its immediate aspect [is] only a private transaction may...be raised by its class or character to a public affair." Block v. Hirsh, 256 U.S., AT 155.

Plaintiff also argues that the taking of her land in Little Comfort serves no public purpose since the land has remained used since the state took title to it in 1962. There is no requirement that the state use condemned land within a particular time frame after the condemnation. The state plans to develop the land into a public marina; it was taken with the same legitimate purpose as bottomed the 1946 takings. Indeed, even if the land is not developed as anticipated, the condemnation still meets the public purpose requirement. The issue is not whether the condemnation actually accomplished its purpose, or even whether the Act authorizing it did so. The question is whether the legislature could have rationally believed that the purpose would be promoted. See Hawaii Housing Authority, supra at 4676. Quite clearly the legislature's belief that the 1962 condemnation of Plaintiff's land would result in waterfront property management

beneficial to the public was rational. Hence, Plaintiff's attack on the condemnations must fail.

Litigation of these issues which could have been raised in the state court or timely reserved for determination by this Court is barred by res judicata. Accordingly, the Magistrate's report and recommendation is not adopted and the Defendants' motion for summary judgment is granted.

SO ORDERED.

/S/
Francis J. Boyle, Chief Judge
United States District Court
District of Rhode Island

July 30, 1984.

FOOTNOTES

1 In support of its motions the defendants raised arguments based on the statute of limitations, the quitclaim deed and release, res judicata and collateral estoppel.

2 It is axiomatic that the federal district court does not sit as an appeals court from the state system. District of Columbia Court of Appeals v. Feldman, ___U.S.___, 103 S.Ct.

1303, 1315 (1983); McCorvey v. State Insurance Fund, 535 F. Supp. 5, 7 (W.D. Okla. 1981). The state supreme court is the final authority on matters of state law. Therefore, even if res judicata did not apply to the present case, collateral estoppel would bar the plaintiff from relitigating the issues of the validity and interpretation of the quitclaim deed and release.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

JULIA ELIZA GRIFFIN	:
	:
v.	:
	:C.A. No. 79-0635
STATE OF RHODE ISLAND and PROVIDENCE PLANTATIONS, et al	:

REPORT and RECOMMENDATION

HAGOPIAN, Magistrate.

The instant matter was referred to the United States Magistrate for consideration pursuant to 28 U.S.C. §636 (b) (1) (B). Before the Court is defendants' motion to dismiss and/or for judgment on the pleadings and for summary judgment.

Statement of Facts

This litigation concerns the condemnation by the State of Rhode Island (State) of parcels of land in Narragansett owned by the plaintiff. This land was

and referred to as the "Griffin Marsh Land." In 1946 the property was condemned by the state for "public use." After extensive negotiations a comprehensive settlement agreement was reached, by which, plaintiff received $80,100 and she transferred the property by quitclaim deed to the State. In addition she executed a release of all claims arising from the taking of her properties. In 1962, the State condemned a final parcel owned by the plaintiff.

Plaintiff commenced suit in Providence County Superior Court alleging:

(1) that the taking provision in effect at the time, namely. R.I.G.L. 1938 §27, as amended by P.L. 1945, ch. 1650, was unconstitutional as an invalid delegation of legislative power:

(2) that the condemnations were not for the "use and benefit of the public" as required by the statute, and

(3) that the condemnations represented a unreasonable, arbitrary, and capricious taking of private property in bad faith and in violation of the United States and Rhode Island Constitutions.

Judgment was entered for the defendants on June 15, 1979 by Superior Court Judge Bourcier. Plaintiff appealed the Superior Court decision to the R.I. Supreme Court. During the pendency of that appeal, plaintiff filed the instant action in federal court. This Court deferred action pending the decision of the R.I. Supreme Court. On August 2, 1983, The R.I. Supreme Court issued a opinion in which it ruled that defendant's appeal was sustained and plaintiff's appeal was denied in it's entirety.

Defendants have filed the instant motion to dismiss and/or for judgment on the pleadings and for summary judgment. Defendant's urge that the doctrines of res judicata and/or collateral estoppel bar

this action. Defendants further urge that plaintiff's action is barred by the applicable statute of limitations and by laches.

Discussion

At the outset, a distinction must be made between (1) a motion to dismiss under Rule 12(b) (6); and (2) a motion for judgment on the pleadings under Rule 12 (c); and (3) a Rule 56 motion for summary judgment.

A Rule 12 (b) (6) motion to dismiss for failure to state a claim upon which relief can be granted, merely asserts that the pleading to which the motion is directed does not sufficiently state a claim for relief; it does not challenge the actual existence of a meritorious claim. A motion for judgment on the pleadings under the Rule 12 (c) is based on the contention that the moving party is entitled to a judgment on the face of all the pleadings.

In contrast, a summary judgment motion typically is based on the pleadings and any affidavits, depositions and other forms of evidence relevant to the merits of the challenged claim or defense that are available at the time the motion is made. Wright & Miller, Federal Practice, §2713 at 391. As a matter of practice, many courts have ignored the differences among these devices. However, when outside matter is presented to the court on a motion under either Rule 12(b) (6) or Rule 12(c), it should be treated as one for summary judgment under Rule 56. Wright & Miller, Federal Practice, §2713 at 395, n.84 and n.85. Thus, the matter before me, although captioned as a "motion to dismiss and/or for judgment on the pleadings and for summary judgment," shall be treated as a motion for summary judgment.

Summary Judgment

In consideration of a motion for

summary judgment under Fed.R.Civ.P. 56, the moving party must demonstrate the lack of any genuine issues as to any material fact. See Mack v. Cape Elizabeth School Board, 553 F.2d 720 (1st Cir. 1977).

In determining whether summary judgment is appropriate, the court must "look at the record in the light most favorable to the party opposing the motion." Hahn v. Sargent, 523 F.2d 461 (1st Cir. 1975). Similarly the court must indulge all inferences favorable to the party opposing the motion for summary judgment. Roger v. Ilikon, 361 F.2d 260 (1st Cir. 1966).

The burden is placed on the moving party to prove that there is no genuine issue of material fact as to every relevant issue raised by the pleadings. See Mack, supra. Once this has been accomplished, the non-moving party has the burden of proving that such issues of fact

do exist. See Emond Oil v. James Schlesinger, (D.R.I., C.A. No. 77-0191). The evidence manifesting such a dispute must be "substantial", going beyond the allegations of the complaint. See Thyssen Plastik Anger KG v. Induplas, Inc., 576 F.2d 400 (1st Cir. 1978).

Summary judgment is available only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Cartagena v. Sec. of Navy, 618 F.2d 130 (1st Cir. 1980).

Land Use Jurisdiction

Although neitner party has raised the issue, I must consider the nature of this claim as distinguished from traditional land use cases for the purpose of §1983 jurisdiction. Cases involving regulatory

land use control have hinged upon a determination of whether a "taking" has occurred. Jurisdiction over the regulation of land use is firmly entrenched in the State court. The First Circuit has routinely held that a mere characterization of a claim as a §1983 action will not invoke this Court's jurisdiction. See Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir. 1982); Cloutier v. Town of Epping, 714 F.2d 1184 (1st Cir. 1982); Chiplin Enterprises, Inc. v. City of Lebanon, (No. 83-1062, slip op., 1st Cir. August 1, 1983); Dworman v. Fuller, (No. 81-710B, slip op., C.J. Boyle, DRI September 30, 1983). Once the regulation reaches the level of a true "taking", as in eminent domain proceedings, the Fifth Amendment of the U.S. Constitution is invoked and made applicable to the States through the Fourteenth Amendment.

The plaintiff before me is challenging the power of eminent domain of the State,

as applied to her land. She further alleges that the "taking" was violative of the very terms of the State statute and of the U.S. and Rhode Island Constitutions. This brings her claim within the ambit of 42 U.S.C. §1983.

Statute of Limitations

Defendants urge that plaintiff's claim is barred by the statute of limitations. I disagree. My reasons are these.

It is a well established principle that as the Civil Rights Act makes no statute of limitations provision, I must look to the most analogous state statute. Johnson v. Railway Express Agency Inc., 421 U.S. 454, 95 S.Ct. 1716 (1975); Runyon V McCrary, 427 U.S. 160 (1976).

Defendants assert that R.I.G.L. §46-5-6[1] applies. This is clearly erroneous. While the cited statute deals with the condemnation of land by the state,

it addressed the issue of just compensation for the land, and not, as here, the question of whether the taking was a proper one. The plaintiff here is not challenging the amount of compensation she received. In fact, that claim was appropriately brought and settled within the statute of limitations cited in R.I.G.L. §46-5-6.

Rather, as has been well established by this Court, R.I.G.L. §9-1-14, which applies a three-year statute of limitations to actions alleging injury to the person, will apply to §1983 actions. Marrapese v. R.I., 500 F.Supp. 1207, 1224 (R.I. 1980); Walden III, Inc. v. Rhode Island, 576 F.2d 945 (1st Cir. 1978); Partin v. St. Johnsbury Co., 447 F.Supp. 1297 (R.I. 1978).

While state law may control in determining the applicable limitations period, the time of accrual of a civil rights action is a question of federal law. Briley v. State of Cal., 564 F.2d 849

(9th Cir. 1977); Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975); Lavelee v Listi, 611 F.2d 1129 (5th Cir. 1980); "Federal law holds that the time of accrual is when the plaintiff knows or has reason to know of the injury which is the basis of the action." Cox, supra at 50. Since the injury alleged by the plaintiff stems from the defendant's dedication of the land in question for private use rather than public use, it was impossible for the plaintiff to have knowledge of the injury at the time of the taking. Plaintiff could not have known to what use the land was going to be put until it was done. It fact, plaintiff alleges that this injury continues to the present. The court in Perez v. Laredo Junior College, 706 F.2d 731 (5th Cir. 1983), a §1983 employment discrimination case, addressed the accrual of a cause of action based on a continuing violation theory.

> If the discrimination alleged is a single act, the statute begins to run at the time of the act. If, on the

> other hand, the statutory violation does not occur at a single moment but in a series of separate acts and if the same violation was committed at the time of each act, then the limitation period begins anew with each violation and only those violations preceding the filing of the complaint by the full limitations period are foreclosed. (citations omitted) Perez, supra at 733-4.

The First Circuit has also held that in a continuing conspiracy to violate civil rights, the statute of limitations will run from the occurrence of each action in furtherance of the conspiracy. Jimenez v. Toledo, 604 F.2d 99, 101 (1st Cir. 1979); Jimenez v. Toledo, 576 F.2d 402, 404 (1st Cir. 1978); Kadar Corp. v. Milbury, 549 F.2d 230, 234 (1st Cir. 1977). The plaintiff here has both alleged a conspiracy and a continuing violation of her rights. The continuing action of the defendants which renews the statute of limitations is the continued leasing of the land for private enterprise when said land was condemned for public use. The execution of leases and collection of rent

by the States and its status as a landlord and competitor in the capitalistic system of the real estate business serves as sufficiently alleged continuing activity within the three year period of the statute of limitations in furtherance of the alleged conspiracy, and in furtherance of the violation of plaintiff's constitutional rights.

Thus, I find that plaintiff's claim is not barred by the applicable statute of limitations.

Laches

Defendants further argue that doctrine of laches further prevents the plaintiff from maintaining this action. Defendants' reliance on this doctrine is misplaced. As the court stated in Needleman v. Bohlen, 386 F.Supp. 741 (Ma. 1974):

> In a action seeking money damages and equitable relief under 42 U.S.C. §1983, the statute of limitations controls; the doctrine of laches is not applicable. Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970); Baker v. F&F

Investment, 420 F.2d 1191 (7th Cir.), cert denied, 400 U.S. 821, 91 S. Ct. 40, 27 L.Ed. 2d 49 (1970). Id. at 749.

Thus, the defense of laches is unavailable in the instant matter.

Release

Defendant's next argument in support of their motion for summary judgment involves a release sighed by the plaintiff.[2] Defendant assert that by executing the lease, plaintiff is forever barred from raising any claims related to the condemned land. A review of plaintiff's complaint reveals that this defense is equally without merit.

Plaintiff has alleged that she was required to sign the release in question before that State would remit to her the agreed upon payment for the condemned property. She further asserts that this requirement was in violation of her statutory and constitutional rights under 42 U.S.C. §1983. This allegation is

sufficient to bring the validity of the release into question pursuant to 42 U.S.C. §1983.

Of greater concern in the matter before me, however, is the fact that the release is not even applicable to the plaintiff's present claim. The release plaintiff signed on March 30, 1948, reads in part as follows:

> ...I...remise, release and forever quit claim unto the State of Rhode Island all and all manner of actions, causes of actions (etc.)...which... (I) ever had, now have or ought to have...from the beginning of the world to the day of the date of these presents. (emphasis added)

The plaintiff released her rights to all claims up to March 30, 1948, the date that she executed the release. At that time, the cause of action upon which the plaintiff now sues, had not arisen. As I have previously discussed in considering the accrual of the statute of limitations, the injury which the plaintiff alleges, did not occur until such time as the defendants failing to dedicate the

condemned parcel for public use, instead leased the land to private enterprise for private use and monetary gain. At the time the plaintiff signed the release, these actions had not yet occurred. Plaintiff cannot be held to have released a claim for future injuries resulting from acts which have not yet occurred. To do so would be tantamount to holding her to the knowledge of a soothsayer. Thus, since the release is not applicable to the instant claim, the question of the validity of the release is not relevant to the matter before me.

Res Judicata/Collateral Estoppel

Defendants urge that the doctrine of res judicata and collateral estoppel bar plaintiff's action. I disagree and my reasons are these.

The doctrine of res judicata has the duel purpose of protecting litigants from the burden of relitigating an identical issue with the same party, and of promoting

judicial economy by preventing needless litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1970); Lovely v. LaLiberte, 498 F.2d 1261 (1st Cir.), cert. denied, 419 U.S. 1038 (1974). The United States Supreme Court, in Commissioner v. Sunnen, 333 U.S. 591 (1948), has succinctly described the doctrine of res judicata as follows:

> The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon consideration of economy of judicial time and public policy favoring the establishment of certainty in legal relations. the rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to a the suit and their privies are thereafter bound 'not only as to every matter which was offered and received, but as to any other admissible matter which might have been offered for that purpose.' Cromwell v. County of Sac, 94 U.S. 351, 352, 24 L.Ed. 195. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties on any ground whatever. Id. at 597.

The doctrine of res judicata applies to bar a plaintiff's claims where (1) the parties to the present action are the same or in privity with those in the prior litigation; (2) a court of competent jurisdiction entered a valid, final judgment on the merits of the earlier claims; and (3) the present action concerns the same subject matter or cause of action as the prior action. Schiavulli v. Aubin, 504 F.Supp. 483, 486 (D.R.I. 1980); Haefner v. County of Lancaster, Pa., 543 F.Supp. 264, 265 (E.D.Pa. 1982), aff'd without op., 703 F.2d 550 (3rd Cir. 1983). The Rhode Island Supreme Court, in Estate of Basset v. Stone, 458 F.2d 1078 (1983), has identified a fourth criteria for the application of res judicata--there must be "identity for claims of relief." The principles of res judicata are fully applicable in civil rights actions. Isaac v. Schwartz, 706 F.2d 15 (1st Cir. 1983); Tarantelli v. Monafo, et

al, (C.A. No. 81-0549B, C.J. Boyle, July 12, 1983).

Collateral estoppel like the doctrine of res judicata, precludes the litigation of certain issues, questions of law or fact, which have previously determined. The requirements for its application are similar: (1) The issue to be precluded must be identical to that involved in the prior action; (2) the issue must have been actually litigated in the prior action, with a final judgment on the merits, and (3) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. Matter of Merrill, 433 F. Supp. 455 (1977); Starkes v. United States, 602 F.2d 1341 (9th Cir. 1979); Skrzat v. Ford Motor Company, 389 F.Supp. 753 (R.I. 1975); and Parklane, supra.

In the matter before me, there is no dispute over the identical nature of the parties, and the entry of a valid final

judgment in the state action. The questions remaining to be determined by me are whether, for the purposes of res judicata, the instant suit concerns the same cause of action as the prior state suit; and whether for the purposes of collateral estoppel, issues of fact or law essential to the prior judgment have been actually litigated, with a final judgment on the merits of those issues.

I find that the federal court action, while it may arise out of the same nucleus of operative facts, constitutes a separate cause of action from the prior state court litigation. Res judicata is thereby inapplicable. The U.S. Supreme Court in Migra v. Warren City School District Board of Education, (No. 82-738, slip op., January 23, 1984), held that the preclusive effect of a state court judgment in a federal court §1983 action, is determined by looking to the preclusive effect of that judgment in the forum state. Thus, I must

look to Rhode Island law to determine whether res judicata is applied on the basis of each "claim", or each "cause of action". While these terms are often used interchangeably, a distinction must be made here. "Claim" is a more general term, encompassing the entire set of facts, issues, and causes of action arising out of a single nucleus of operative events. "Cause of action" on the other hand, refers to the more narrow concept of the remedy or right infringed upon. For example, a claim for money owed may include one cause of action on a promissory note, and another on a book account. See Randall v. Carpenter, 25 R.I. 641, 644 (1904).

A review of Rhode Island law on this point reveals that a cause of action approach has been used to determine the applicability of res judicata.[3] The cases cited by both sides support this conclusion.

In the recent R.I. Supreme Court case, Estate of Basset, supra, Justice Murray enumerated:

> ...for res judicata to bar a cause of action, there must be (1) identity of parties, (2) identity of issues, (3) identity for claims of relief, and (4) finality of judgment. Id. at 1080.

The terminology "claims for relief" is synonymous with the concept cause of action.

Both plaintiff and defendants have cited Zalobowski v. New England Teamsters and Trucking Industry Pension Fund, 410 A.2d 436 (R.I. 1980) in support of their arguments. In that case, a plaintiff sought to use a prior judgment offensively to recover amounts under an installment contract which had not become due as of the filing of the first action. The R.I. Supreme Court held that the action was not barred by res judicata, despite the fact that both actions arose out of the same pension agreement. Rather, the court found that separate causes of action, which they

referred to as claims, arose out of the same operative facts. Since the second cause of action had not been litigated in the prior suit, the defense of the fund to the action was barred neither by res judicata nor collateral estoppel.

The court in Beaufort & Sons, Inc. v. Trivisonno, 403 A.2d 664 (1979), a landlord-tenant dispute, made a distinction between a suit seeking possession and one for damages. Although arising out of the same set of facts, the two actions were premised on separate claims, or "causes of action", and, therefore, res judicata did not apply. The court went on to note, however, that while the principles of collateral estoppel are included within the doctrine of res judicata, Harding v. Carr, 79 R.I. 32, 39, 83 A.2d 79, 82 (1951), a distinction must be made between the two doctrines.

> In Providence Teachers Union Local 958 v. McGovern, 113 R.I. 169, 172, 319 A.2d 358, 361 (1974), we pointed out that collateral estoppel precludes in a subsequent suit on a different

> claim the consideration of an issue actually litigated in a prior action between the same parties. (emphasis added) Beaufort, supra at 667.

Thus even though res judicata may not bar the relitigation of a new cause of action, if an issue of law or fact had been actually litigated in a prior action between the parties, collateral estoppel may bar the relitigation of that issue, and the prior determination of fact or law may be used for the purpose of the new cause of action.

The defendants rely significantly upon Corrado v. Providence Redevelopment Agency, 320 A.2d 331 (1974) in support of their position. The plaintiffs in Corrado brought an action in Superior Court seeking to prevent a proposed taking of their property under the eminent domain powers of the State. They asserted that the proposed taking would be violative of their rights of due process, and would not be serving a public purpose. This action (No. 68-4656) was dismissed on the statute of limitation

grounds. Subsequently, plaintiffs initiated a second action. The Superior Court dismissed the second action pursuant to the doctrine of res judicata. On appeal, the R.I. Supreme Court queried:

> ...whether the dismissal was called for by the established principles which bar relitigation of the same cause of action between the same parties and provide that a final judgment on the merits in a prior proceeding in conclusive not only on the issues actually raised and determined, but also on every issue which might properly have been litigated and decided therein. (emphasis added) (citations omitted). Corrado, supra at 332.

The Supreme Court upheld the upper court's application of res judicata to the second action. In reaching this result, the court determined that the cause of action was the same in both cases.

> The Corrados further contended that this cause of action is not so closely identified with that C.A. No. 68-4656 as to justify application of the rules of res judicata. But that is not so. Instead, the two complaints are facially almost identical, even to the point of repeating typographical errors. Both name the same parties, seek the same relief, involve the same subject matter, arise out of the same

> occurrences, and rest in the common contention that the proposed taking under the redevelopment plan would deprive the Corrados of their property without due process of law in violation of both the federal and state constitutions. Corrado, supra at 333.

Thus while the result may appear to support the application of res judicata in the matter before me, a close reading of the court's rationale supports the proposition that the Rhode Island courts follow a "cause of action" approach to the application of the doctrine.

Such a conclusion is not inconsistent with this court's decision in Davis v. Wood, (C.A. No. 82-0331P, slip op., November 23, 1982) cited by the defendants. In that case, unlike here, the R.I. Supreme Court specifically addressed and rejected the plaintiff's three principle arguments. Slip op. at 2. Thus, Judge Pettine held that plaintiff was barred from repeating the allegations rejected by the R.I. Supreme Court, as the federal court

complaint was based on the same cause of action as the prior state court suit.

Accordingly, unless I find that the two "causes of action" under consideration here are virtually one and the same, res judicata will not bar the litigation of the second suit. While the same nucleus of operative facts predominates both actions, plaintiff's federal constitutional rights were not litigated nor decided in the state court action, nor were they necessary to its decision. The alleged violation of such rights constitutes a separate and distinct cause of action from that raised in the prior litigation, and the doctrine of res judicata does not apply.

Such a result is further in accord with the principles of the Civil Rights Act to provide a federal forum for federal law complaints. As the U.S. Supreme Court noted in Mitchum v. Foster, 92 S.St. 2151 (1972), The Civil Rights Act affords protection from state action, whether that

action be executive, legislative, or judicial.

> In enacting provision of Civil Rights Act authorizing a suit in equity to redress deprivation under color of state law of any rights, privileges, or immunities secured by Constitution, Congress conceived that it was altering relationship between states and the nation with respect to protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to vindication of those rights; AND IT BELIEVED THAT THESE FAILINGS EXTENDED TO STATE COURTS. (emphasis added) 42 U.S.C.A. §1983. Mitchum, supra at 2152.

Thus where a plaintiff specifically elects, as is the case here, to litigate her §1983 claims in a federal forum, she should not be precluded from doing so. The plaintiff here neither briefed nor argued her federal claims in the Rhode Island Supreme Court. Nor were plaintiff's federal claims decided by the Rhode Island Supreme Court. In fact, plaintiff notified the Rhode Island Supreme Court of the pendency of the federal issues in this

court. The Migra court addressed this very concern in a footnote.

> In the event that a §1983 plaintiff's federal and state law claims are sufficiently intertwined that the federal court abstains from passing on the federals claims without first allowing the state court to address the state law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court. See e.g., England v Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). (emphasis added) Migra, supra, slip op. at 9, n.7.

This is precisely the posture of this case. As I stated in my prior Report and Recommendation in this case of November 20, 1981, at page 4:

> In order to insure that the plaintiff will have a full hearing on the federal constitutional issues if necessary, this Court should retain jurisdiction pending the state court proceedings.

As I mentioned previously, a distinction must be made between res judicata and collateral estoppel. While I find res judicata does not apply,

this does not per se bar the application of the doctrine of collateral estoppel. Beaufort, supra. The test is whether a particular issue of fact or law has been actually litigated in the prior action on the same cause of action, and was necessary and essential to a resulting judgment on the merits.

A review of defendant's pleadings and memoranda reveals that defendants have not affirmatively availed themselves of the doctrine of collateral estoppel. Throughout their papers, defendants assert the defense of res judicata, urging that plaintiff's claim is barred in toto. A party must inform the court with particularity, precisely what issues of fact or law are sought to be precluded. Thus, I can only conclude that defendants seek to preclude plaintiff's claim in its entirety as distinguished from any specific issues actually litigated in the state court proceedings. While defendants may

term their motion as one based on collateral estoppel, they have more accurately sought to avail themselves of the doctrine of res judicata. As I have previously disposed of this defense, I need not address it any further.

Federal Property Interest

One final issue, neither briefed not argued by either party, is the question of what is the federal property interest sought to be protected. 42 U.S.C. §1983 protects against "the deprivation of any rights, privileges or immunities secured by the constitution and laws" of the United States. Thus, in order for a claim to be actionable under §1983, the plaintiff must show the denial of some such right, privilege or immunity. Parratt v. Taylor, 451 U.S. 527 (1981); Martinez v. California, 444 U.S. 277 (1980). Section 1983 is not in itself a source of substantive rights. It provides a remedy

only, and the substantive rights must be found in the United States Constitution or the laws of the United States. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979); Maine v. Thiboutot, 448 U.S. 1 (1983).

The federally protected right allegedly violated here is found in the Fifth Amendment's prohibition against the taking of private property for public use without just compensation. This prohibition is applied against the states through the Fourteenth Amendment. San Diego Gas & Electric Co. v. San Diego, 67 L.Ed. 2d 551, 101 S.Ct. 1287 (1981); Webb's Fabulous Pharmacies, Inc. v. Beckworth, 66 L.Ed. 2d 358, 101 S.Ct. 446 (1980). Furthermore, the taking of private property for a private use by authority of the state is a violation of the due process clause of the Fourteenth Amendment. Ridden v. Philadelphia, B&W R. Co., 182 Md. 336, 35 A.2d 99. Thus, the plaintiff

has alleged a federally created and protected substantive right, independent of any other right, which may or may not have inured by reason of the state constitution and/or state laws.

Recommendation

Accordingly, defendants' motion to dismiss and/or for judgment on the pleadings and for summary judgment should be denied. I so recommend to the Court.

/S/

JACOB HAGOPIAN

United States Magistrate

March 23, 1984

FOOTNOTES

1. R.I.G.L. §46-5-6 provides in pertinent part:

> Any owner or person who cannot agree with said department of environmental management (formerly read 'department of natural resources') for the price of his estate or interest in any such land may, within six (6) months after personal notice of such taking, or if he has had no personal notice, within one (1) year from the filing of said description, plat and statement, apply by petition to the superior court for one (1) counties in which said land is located, setting forth such taking of his land or his estate or interest in such land and praying for an assessment of damages by jury.

2. The release provides in pertinent part:

> NOW THEREFORE, I J. Eliza Griffin, in consideration of eighty thousand one hundred and 00/100 (80,100.00) dollars to me paid to the State of Rhode Island, the receipt of which is hereby acknowledged, and the further consideration that the Restaurant Building, so-called, now Lot. No. 1., Parcel No. 1, is become the property of J. Eliza Griffin as per a special agreement made this day, do hereby remise, release and forever quit claim unto the State of Rhode Island all and all manner of actions, causes of actions, debts, dues, claims and demands, both in law and equity, and without limiting the generality of the foregoing, especially for the value of the land taken as aforesaid and any and all damages incident or related to said taking, which against said Department of Public Works on behalf

of the State of Rhode Island, or the State of Rhode Island ever had, now have, or ought to have, for or by reason of any matter or thing from the beginning of the world to the day of the date of these presents. (Exhibit "N" to plaintiff's Complaint.)

3. In reaching this conclusion, I have not looked merely at the terminology used by the courts, but rather have attempted to look beyond the words, to the concept embodied therein.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

JULIA ELIZA GRIFFIN	:
	:
vs.	: C.A. NO. 79-635
	:
STATE OF RHODE ISLAND	:

PROCEEDINGS HELD ON 19 MAY 1982, IN THE ABOVE-CAPTIONED CASE, IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND, BEFORE HONORABLE FRANCIS J. BOYLE.

APPEARANCES:

FOR THE PLAINTIFF--------NORMAN GRANT, ESQ.

FOR THE DEFENDANT---CHARLES MC KINLEY, ESQ.

19 MAY 1982

THE COURT: Mr. Grant this is your objection.

MR GRANT: Yes, your Honor. May it please the Court, this matter came on to be heard before the Magistrate on the defendant's motion to dismiss saying that the statute of limitations had run, and that the doctrine of res judicata and collateral estoppel should apply, and I moved for summary judgment as there are no factual issues to be decided.

The Magistrate heard this matter and rendered a decision applying the doctrine of abstention, and set out in the decision because he was applying this doctrine, it was unnecessary to decide the remaining questions as to the statute of limitations, laches, collateral estoppel and res judicata.

THE COURT: Well, he denied the motion to dismiss, didn't he?

MR. GRANT: He did later, your Honor. That's what I'm -

THE COURT: Well whatever. Whether he did it at that time or later, he in fact did deny the motion to dismiss.

MR GRANT: He did.

THE COURT: So what's your problem?

MR GRANT: Well, from that, I'm not sure whether the have the right to raise this again or not.

THE COURT: Well, is there any effort to raise it again?

MR GRANT: No, your Honor.

THE COURT: Well then what are you worried about?

MR GRANT: I'm happy , if that is the situation, your Honor, very happy.

THE COURT: Well -

MR. GRANT: I'll rest at that point. But I wasn't sure what the effect of his second addition to the decision was. If that's the effect, I'm happy with it.

THE COURT: If what's the effect?

MR GRANT: That the motion to dismiss is denied.

THE COURT: Well, it is. Didn't he say so.

MR GRANT: On its merits.

THE COURT: I didn't know why he said so, but that's what he said.

MR. MC KINLEY: Your Honor, may I address the Court on that issue?

THE COURT: Let Mr. Grant finish and then we'll see. We don't want you popping up -

MR MC KINLEY: I don't want him to sit down and have left that unclarified.

THE COURT: Well, you just be patient with us and we'll get to you. We hear both sides here, one at a time.

MR GRANT: Now the Magistrate in his opinion set out that he felt the first question to be determined, the first issue to be resolved, was the existence and the nature of the plaintiff's right to buy back her property which is before the Rhode

Island Supreme Court, and that that having been decided, may dispose of her claims so that the resolution of the federal issue would not be involved. And I respectfully submit that the resolution of that question will not have any effect on plaintiff's constitutional rights in this court or her rights under 1983. All that would simply say was, if the Supreme Court said she had that right, they would have to offer it back to her to lease as they are presently leasing the property. The State has never offered any of this property for sale. They have leased all of it.

THE COURT: Well, wouldn't she be entitled to some damages or something?

MR GRANT: I think she would be entitled to some damages, your Honor.

THE COURT: It started when, 1947?

MR GRANT: Yes, I think she would be entitled to damages.

THE COURT: At least the property that was leased was property that was taken by

condemnation in 1947, she ought to be entitled to some damages for 1947 forward. Wouldn't that take care of your problems, this marshland that the state has converted into a sports paradise?

MR. GRANT: No, it wouldn't, your Honor, because we fee -

THE COURT: According to Judge Bourcoer's decision.

MR. GRANT: Yes, according to his decision, and I think that was am inept - an inapt description of the property, even though it was labeled as a marshland on the recorded plats in 1930.

THE COURT: Well, the people in Johnston aren't expected to know what's going on down Galilee.

MR. GRANT: In any event, I don't think that would resolve the plaintiff's constitutional rights for taking of her private property.

THE COURT: What else do you want?

MR. GRANT: We want the property back.

THE COURT: That would get you money. That would put in question the validity of the states taking entirely.

MR. GRANT: No, it wouldn't, your Honor. That wouldn't put that in issue, and Judge Bourcier says -

THE COURT: You mean if the State wrongfully in - if the state took the property in 1947, and then wrongfully leased it, that wouldn't put you in a fairly strong position with those people who have invested millions of dollars in the area? Their leases are invalid then.

MR. GRANT: Their leases are invalid.

THE COURT: Wouldn't the taking by the state be a serious question?

MR. GRANT: Well, it would be a question as to what relief the state court might grant, but I think they might say well -

THE COURT: It would be a question of who could bail out fast enough to save the situation down there.

MR. GRANT: That's about what it amounts to.

THE COURT: There would be some banks that would be probably in trouble.

MR. GRANT: That's right, there would be, but I think at that point someone may try to bail the state out.

THE COURT: Let me ask you something, didn't Judge Bourcier get into constitutionality of this taking?

MR. GRANT: No, he didn't, your Honor, not at all.

THE COURT: Well, I looked at his rescript and he said - this is at page 10: "Several problems for the plaintiff arise by virtue of her actions in 1946. The first is that she cannot now question the validity of the statute where she has previously invoked the remedy provided by that statute. She filed her assessment of damages pursuant to the provisions of the very statute she is now claiming to be unconstitutional. This she cannot do."

MR. GRANT: Yes, and I agree with that statement, your Honor. I did allege that the -

THE COURT: aren't you claiming here that the taking is unconstitutional?

MR. GRANT: The result of the taking, the use of the land.

THE COURT: Or whatever.

MR GRANT: They alleged they were taking it for public purposes and, in fact, they did not, and never used it.

THE COURT: That's what Judge Bourcier is considering also, isn't he?

MR. GRANT: No, he's not, your Honor. He's considering the statute itself. The statute that it was condemned under was unconstitutional, but it should have been challenged.

THE COURT: The statute was not unconstitutional. The repurchase provision violated the provisions of the Rhode Island Constitution.

MR. GRANT: That's a different statute, your Honor. He found that unconstitutional. I'm talking about the original -

THE COURT: The statute under which this property was taken is unconstitutional?

MR. GRANT: Absolutely. In my humble opinion, your Honor, it is totally unconstitutional.

THE COURT: But you haven't been able to lead any court into that era up to this point.

MR. GRANT: Solely because it was not challenged at the time of the taking. I would tend to agree at this point we probably waived that right, but the question is they took it for public purposes and never used it for public purposes. We have a right to challenge that now, and that is what we are challenging/

THE COURT: He says the plaintiff's estopped.

MR. GRANT: From challenging the constitutionality of the condemning statute. That doesn't mean we waive our rights that if they improperly use the property, later on, that we can't challenge that, your Honor.

THE COURT: It says the plaintiff has waived.

MR. GRANT: The right to challenge the condemning statute. Solely the condemning statute. That's the only thing he decided there, your Honor. The right to challenge the statute under which it was condemned.

THE COURT: All right.

MR. GRANT: But that does not reflect on the state's subsequent use. They did not use it for the purposes for which it was condemned, and they used it solely for private, commercial purposes, leasing out to private enterprises, and when my client discovered this -

THE COURT: Well, thats a argument.

MR. GRANT: That's and argument, but that's what were challenging now and saying this a fact, they're using it for private purposes.

THE COURT: Were is this case now, the case that Judge Bourcier decided?

MR. GRANT: Rhode Island Supreme Court, your Honor.

THE COURT: When is it going to be argued?

MR. GRANT: My brief has yet been accepted by the court. I have to revise it, which will probably be done within three or four weeks. The state then has to file their brief, then it will be placed down for argument.

THE COURT: When is it going to be argued then?

MR. GRANT: I would say fall or early part of 1983. your Honor.

THE COURT: Do you have anything further?

MR. GRANT: The only thing I have to say, your Honor, is that the requiring of the signing of the quitclaim deed release in my opinion violated her 5th, 14th constitutional amendment right and 1983. It was not an intelligent, knowing relinquishment of a known right, and the state had nor right to require it.

THE COURT: It sounds like the defendant who told me the other day that when he pleaded guilty, he told me there was no force or coercion applied to him, that that was correct at the time, but after he thought it over, he decided it just wasn't so, that he was being coerced. Now, you had Judge Watts represented Mrs. Griffin at the time, competent lawyer.

MR. GRANT: Yes.

THE COURT: And she decided to release her - give a release to the state.

MR. GRANT: Give a release for her damages for the land condemned. That's the language.

THE COURT: Any causes of action that's in the general language -

MR. GRANT: For the damages for the land condemned.

THE COURT: Any claims or causes of action, as I -

MR. GRANT: As a result of the condemnation of her land, it said, your Honor. And this is not an action for the condemnation of her land. It is the improper use of it thereafter.

THE COURT: A condition subsequent, I take it.

MR. GRANT: A condition that came about subsequent to the taking. So that I don't think it had anything to do with the release, and I think the requiring of the release, also the contractual language in the release under the Chevon case must be clear and unequivocal that it is a known right that is being released, and the plaintiff knows what's being released, and if it's a constitutional right, she should

be entitled to a hearing before releasing it. There is no language whatsoever in either the deed or release as to her constitutional right of pre-emption or any further rights, constitutional rights she might have in the event the state abuses the condemnation process by using it for private purposes. I think this is a right guaranteed by our constitution. So that it can't be taken by condemnation. That's with her forever, and if the state doesn't use the land for public purposes, she has a right to try to get it back because it's a violation of constitutional right and in violation of 1983, also. Thank you, your Honor.

THE COURT: Now it's your turn.

MR. MC KINLEY: Good morning, your Honor. I did want to clarify what I understood the subsequent errata, so-called memo, that was issued by Judge - Magistrate Hagopian.

THE COURT: Not so-called, that's what it is called.

MR. MC KINLEY: Okay, errata. My understanding of that, and this is based on checking with his clerk at the time and for purposes -

THE COURT: Now we're getting into parole evidence.

MR. MC KINLEY: Parole evidence, but it is that that denial or dismissal was without prejudice.

THE COURT: You mean the Magistrate's law clerk is telling you what the effect of the Magistrate's decision is intended to be.

MR. MC KINLEY: Well, the law clerk checked with the Magistrate and called me back.

THE COURT: If you got anything like that in mind, you go see the Magistrate.

MR. MC KINLEY: Yeah, well, that is what the representation is that was made to me. I called the Magistrate and the clerk

spoke to me, but be that as it may, I did want to point out -

THE COURT: If one of my law clerks told you something like that, they'd be in serious trouble, let me tell you. You can be sure that they won't.

MR. MC KINLEY: The motion to dismiss originally was brought in addition to the res judicata grounds, and the statute of limitations grounds and laches grounds also on this waiver and estoppel.

THE COURT: What is this all about? Suppose that the Rhode Island Supreme Court decides - who knows what they're going to decide, but suppose that they decide that indeed the effect of this release and the quitclaim deed was not to bar the right to repurchase or to take a lease of the property if the state sought to sell or lease the property. What's the result of that?

MR. MC KINLEY: My -

THE COURT: You're out of business in Galilee, aren't you?

MR. MC KINLEY: My assumption is that it would then be remanded to the Superior Court for a trial on that issue.

THE COURT: On what issue?

MR. MC KINLEY: On whether or the use is continued to be for public purpose, as the plaintiff's alleged that it is not. The implications to be dealt with as I understand it.

THE COURT: Suppose they decide that you can't, whether it's for a public, private, or semi-private business, that you can't lease the property to x unless you offer it to Mrs. Griffin first, on the same basis. What happens then?

MR. MC KINLEY: That would be the issue that they would address in interpreting -

THE COURT: The case is all over.

MR MC KINLEY: That would be the issue I think they would try to determine.

THE COURT: Suppose they decide that the case is all over. The ball game is lost. The season has ended.

MR. MC KINLEY: I think that's right, and I think that's where it should be resolved, in the state court proceedings. It was once resolved, and it's on appeal as Mr. Grant pointed out.

THE COURT: Why should I decide whether or not there is res judicata here or anything else at this point?

MR MC KINLEY: That's why we did not pursue the appeal. We think the denial -

THE COURT: You agree with the Magistrate's determination. You didn't object to it.

MR. MC KINLEY: No, as I said, when the original decision was issued, the understanding was that he had not made a decision on the original dismissal motion. At the time of the hearing before the Magistrate Hagopian, he asked that we supply supplementary briefing on the issue

of abstention and on the issue of privity in the res judicata context. We then came back and he issued his decision. My understanding at the time was that he did not make a ruling one way or another on our original motion to dismiss but preferred to take a lesser alternative, i.e., the abstention, to stay the hand of his court until the state court proceedings had run it's full course.

THE COURT: Abstention and a stay are two very different things, aren't they? If this court abstains, that means we're not going to decide the question ever: that the question is to be determined in the state court.

MR. MC KINLEY: Well, you may be right. I defer to your judgment. My understanding is that abstention allows either an outright dismissal or the court to stay it's hand pending the resolution in the state court.

THE COURT: That's what I'm trying to tell you, there is a difference between abstention and a stay. It seems to me there is some confusion in this memorandum.

MR. MC KINLEY: Yes. I agree there is some confusion. I would also like to address -

THE COURT: well, I still didn't get an answer, yes or no, do you disagree with the Magistrate's determination or agree with it?

MR. MC KINLEY: We agree that the court should abstain. We also -

THE COURT: I know it is. It's almost impossible for lawyers to say yes or no. My question is do you agree with it or do you disagree with it?

MR. MC KINLEY: We agree that the Court should abstain if it is interpreted that it should not also dismiss the action for res judicata, collateral estoppel, laches, statute of limitations, and estoppel by waiver and agreement. We

disagree to that portion of it, but that is not how I had interpreted the original decision, not based on my conversation and the clerk checking -

THE COURT: I haven't got the slightest idea what your answer is to my question, I must tell you that.

MR. MC KINLEY: I'm trying to be as explicit as I can and you put me in a difficult posture.

THE COURT: I know when your asked to answer yes or no puts you in an almost impossible posture.

MR. MC KINLEY: We agree -

THE COURT: You didn't take an appeal. You didn't file an objection.

MR. MC KINLEY: That's right. That's what I was attempting to state, to the original -

THE COURT: Well, you didn't file an objection. That's a simple question, isn't it?

MR. MC KINLEY: No, we did not file an objection, that's correct.

THE COURT: You didn't file any objection, so at least you haven't got any record objection to the Magistrate's determination.

MR. MC KINLEY: Not his original one, and based -

THE COURT: You haven't got any to any.

MR. MC KINLEY: No.

THE COURT: But your quarrel is he didn't say without prejudice.

MR. MC KINLEY: Right. I mean, on the errata portion of that, yes. I did want to point out, if I may, your Honor, on the issue on whether the state court addresses the original taking or the subsequent use of the property, as being within the public purpose issue, you refer to some language on the 5th and 14th Amendment regarding estoppel, well there is also this statement on page 13 of the decision that says: The

actual development that has taken place in the area, according to the evidence presented during the trial, reveals to this court the proprietary and planning initiated by the state in 1946 for the development of on the state's most important assets, it's oceanfront property, for the general use of the public. Made perhaps not explicitly but I think implicitly there a finding that that property was taken for public use, and has continued to be used for the public purpose, and I would point out -

THE COURT: It has been used?

MR. MC KINLEY: I think that's the finding of the court, yes.

THE COURT: You have to know that there's a state pier there, and you have to know that there's a Coast Guard station there, and you also have to know that there are some commercial establishments around there which do not belong to the State of Rhode Island.

MR. MC KINLEY: That's correct, but I don't think that's the determining issue.

THE COURT: Like a motel and things like that.

MR. MC KINLEY: Yes certainly there is no question that there are private enterprises being conducted there, but this is no different from any urban renewal area which are clearly within the public purpose doctrine.

THE COURT: Oh, it is quite different from a redevelopment because in 1946, you may not remember back that far, some people do, in 1946, we didn't have things like a requirement that initially a plan upon which there is a public hearing. The public has a chance to come in and tell the agency, the redevelopment agency, that they think it's an excellent idea, or they think it's a rotten idea. You didn't have to have a constitutional amendment, the Rhode Island Constitution at that time. You didn't have a lot of things. And I'm not

sure this is like redevelopment taking. The result may be the same, but it sure wasn't edged around with the kind of formalities that you have to do now.

MR. MC KINLEY: I'm sure I would not dispute that. My only point is that the fact the some enterprises there are carried on by private parties is not determinative of the issue, and I think this issue -

THE COURT: Well, I think if the state takes property and if the state would take your property from you, and give it to me, to run a business, I think that's probably invalid. I don't think they can do that.

MR. MC KINLEY: That may very well may be, but it's part of another project. All I'm saying is that I think this issue was addressed in the state court proceeding and it was decided, and had-if my brother felt it was not adequately addressed in the findings or the decision, he had the opportunity to request further findings and conclusions at that time, and the issue

again is open for his - open to be addressed on his appeal to the Supreme Court when he files his brief. The cases upon which we rely I think are fairly well set forth in the short memorandum I filed, your Honor. And I don't see any purpose in elaborating on them unless you wish to address any of them specifically. Thank you.

THE COURT: It appears that in this matter there is pending in the Supreme Court, State of Rhode Island, an appeal from a decision of the Supreme Court, in two cases, Julia Eliza Griffin v. Flanders and Wood, C.A. 73-57 and 74-866, in the Superior Court for Providence County, State of Rhode Island. The outcome in that proceeding may have a effect on what actions the Court is required to take and what questions this Court is required to address.

The precise issue that is pending here is that raised by the State of Rhode Island

as a defendant, by which the state has moved to dismiss on a number of grounds, contending the matter is res judicata, which, of course, doesn't apply even if the Superior Court proceeding is significant. Here it says there is an appeal pending, so how can it be res judicata while an appeal is pending, I frankly don't know.

THE COURT: You've been heard. And the question of abstention, it seems to me, doesn't apply to this case. I arrive at the same conclusion that the Magistrate did, perhaps by a different course. It seems to me only sensible that this matter be deferred until the Supreme Court State of Rhode Island has filed it's opinion. Sometimes that;s the best reason for doing things. It's not a matter of abstaining. This Court - there isn't any basis for this Court to abstain at this point in time.

It does seem to me that on the basis of the present record, the Magistrate's determination is quite correct, that the

motion to dismiss or for summary judgment must be denied. For that reason, as explained, the Court adopts the Magistrate's Report and Recommendation as to it's conclusion. Both sides may have an exception.

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APPENDIX E

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

JULIA ELIZA GRIFFIN	:
	:
v.	:
	: C.A. No. 79-0635
STATE OF RHODE ISLAND and PROVIDENCE PLANTATIONS, et al	:

MEMORANDUM

HAGOPIAN, Magistrate.

The instant matter is before the United States Magistrate pursuant to 28 U.S.C. 636 {b}{1}{B}.

Defendant State of Rhode Island, et al. has moved to dismiss the complaint because the matter is res judicata, or in the alternative because this court should abstain from deciding a matter presently before the Rhode Island Supreme Court.

Plaintiff objects to the motion to dismiss. She contends that res judicata does not apply because the parties and issues are different from the State. litigation and that principles of comity or federalism do not require the federal court to abstain in a 1983 action when there is pending state litigation.

History of the Case

In 1946 the State of Rhode Island condemned certain properties owned by the plaintiff in Galilee, Town of Narragansett. Plaintiff filed three petitions for assessment of damages in Rhode Island Superior Court, one of which was tried before a jury which awarded plaintiff $27.475.00. When informed that the state planned to appeal plaintiff requested that her attorney settle the cases. Plaintiff executed a quitclaim deed to all the condemned property and signed a release on March 30, 1948. She received $80,100.00, and an agreement to convey building

numbered 6. a restaurant valued at $7,000, on April 27, 1948 in settlement of her three claims.

In 1973 and 1974 plaintiff brought suits in Rhode Island Superior Court contending that the condemnations of her land in 1946 were not for public purpose and that she had been denied her right to lease or repurchase the properties under the Rhode Island Constitution (C.A. No. 73-57 and C.A. No. 74-866). These cases were consolidated and a decision was reached on June 15, 1979, which determined the following:

> 1. Articles of Amendment XVII of the Rhode Island Constitution provides that a landowner whose property was condemned has the right to lease back or repurchase land before the State can sell or lease to private parties. Plaintiff negotiated away this right when she signed the quitclaim deed and release in 1948. Plaintiff's counsel testified in his deposition that plaintiff understood what she was doing and what she was signing. In exchange, the state had given up its right to appeal, building number 6, and $80,100.00. Therefore, plaintiff can now claim that she has been denied a right to repurchase.

2. Plaintiff is estopped from challenging the constitutionality of the condemnation statutes used to take her land since she had full opportunity do do so at the time of the taking and even had she raised such claims, she would have effectively withdrawn them by her settlement.

3. Plaintiff failed to prove that the State condemned more land than was necessary to accomplish the legislative purpose. The court stated that although resolution of this constitutional issue was not required in its decision, it was important to prevent further litigation.

An appeal of this decision has been brought by plaintiff before the Rhode Island Supreme Court and is pending.

Plaintiff filed a complaint in the Federal District Court of Rhode Island in 1979, pursuant to 42 U.S.C. §1981,§1982, §1983 and §1985(3), alleging violation of plaintiff's First, and Fourteenth Amendment rights.

Discussion and Recommendation

In the instant action plaintiff asserts, among other claims, that her right to buy back her property was inchoate, a chose in action, when she signed the deed

and release, and that according to Rhode Island state law the waiver of such a right was effective only if the documents of release contained specific language to that effect. See Ricci v. Cappelluzzi, 90 R.I. 171, 156 A.2d 207 (App. K) (1959). Furthermore, plaintiff contends that the decision in Rhode Island Superior Court did not address the validity of her wavier under the Federal Constitution. She claims that she will be denied a full hearing on the federal issues unless her claim is heard in federal court.

To invoke the protection of 42 U.S.C. §§1981, 1982, 1983 or 1985(3) plaintiff must establish that she was deprived of a property interest under color of state law. Therefore, the first issue to be resolved in this case is the existence and nature of plaintiff's right to buy back her property. which is a matter of Rhode Island law. Where an appellant has both state and federal claims, and where resolution of the

state claim could dispose of the federal claim, this court can abstain from deciding the case to avoid prematurely and unnecessarily deciding the federal constitutional claim. See Muskegon Theatres, Inc. v. City of Muskegon, 507 F.2d 199, 204 (1974), and Railroad Comm'n. v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Such an action is particularly appropriate in a eminent domain case, At least were the state remedy may possibly be adequate and judicial economy will be fostered. Muskegon Theatres, supra at 199, 203.

In order to insure that plaintiff will have a full hearing on the federal constitutional issues if necessary, this court should retain jurisdiction pending the State court proceedings. See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 74 S.Ct. 461, 11 L.Ed. 2d 440 (1964) and Zwickler v.

Kosta, 88 S.Ct. 391, 393 n.4, 389 U.S. 241, 244 n.4, 19 L.Ed. 2d 444 (1967)[1].

The remaining questions raised by the parties as to when the time of action accrued, the applicability of various state statutes of limitation, laches, collateral estoppel and res judicata need not be decided at this time.

Accordingly I recommend that this action be stayed pending a final decision on the appeal to the Rhode Island Supreme Court from Providence Superior Court Actions C.A. No. 73-57 and 74-866.

/S/
JACOB HAGOPIAN
United States Magistrate
November 20th 1981

FOOTNOTE

1 Plaintiff's allegations of a continuing conspiracy under 42 U.S.C. §1983 have not been heard. She seeks injunctive relief as well as punitive damages of Ten Million Dollars in this forum. Furthermore, resolution of her claims before this court will require consideration of federal standards governing the question of what is an effective waiver of a federal constitutional right. See Boykin v. Alabama, 395 U.S. 238 (1969). The preemptive rights claimed by plaintiff do

APPENDIX F

JULIA ELIZA GRIFFIN

v.

ROBERT BENDICK, Director of the Department of Environmental Management,

and

W. EDWARD WOOD, Director of the Department of Transportation

No. 80-26-Appeal.

Supreme Court of Rhode Island.

Aug. 4, 1983

OPINION

KELLEHER, Justice.

The roots of this dispute lie in the now decades-old condemnation of certain lands owned by the plaintiff, Julia Eliza Griffin (Griffin). The parcels, located along the shoreline of the Town of Narragansett, were taken and compensated for by the state in a series of condemnation proceedings that took place in the years 1946 and 1962. Griffin's land was condemned for the ostensible purpose of developing a state port facility. Sometime in 1972 Griffin concluded that she had been aggrieved by these condemnations, and she subsequently filed this Superior Court civil action on January 9, 1973. In her prayers for declaratory relief, Griffin requested the court to award her damages, to reinvest her with title to the properties, and to account for all rentals and fees collected.

Following trial before justice sitting without a jury, both parties took appeals to this court. Upon a review of the

record, we are of the opinion that this controversy raises salient constitutional issues that should be addressed at this time, although the case might be dismissed on other grounds as discussed below. Given the course of action we have chosen to pursue, we find it necessary to indulge in an extensive review of the facts before discussing the merits of the arguments before us.

The land involved in this litigation, along with much of the surrounding property, was originally owned by Griffin's father and referred to as Griffin Marsh Land. On August 2, 1934, a fifty-foot strip of land running north to south across the Griffin Marsh Land was deeded to the state for purpose of constructing a public highway; the strip is now Great Island Road. The state was also given littoral rights to build bulkheads along the waterfront, to deposit any spoils from dredging work, and to construct State Pier

No. 3. These projects were completed by 1936 just after the father's death, at which time his daughter, plaintiff in this suit, took possession of the land. A decade later, with the long-range goal of developing a port facility, the state, acting through its Department of Public Works, Division of Harbors and Rivers, condemned three parcels of the Griffin Marsh Land. Two of the parcels were located in Narragansett in the village of Galilee and the third was situated in that section of Narragansett known as Jerusalem.

More specifically, on March 5, 1946, the state took 17.7 acres of land east of Great Island Road in Galilee and 14,500 square feet of land north of the landing for State Pier No.3 between the bulkhead and Great Island Road. Shortly thereafter, on May 23, 1946, the remainder of Griffin's Galilee waterfront land was taken. The parcel comprises an area that runs shortly from the Champlin's Fish Market building to

the United States Coast Guard Station and then unto State Pier No. 3. Finally on August 22, 1946, the state condemned 1.09 acres of waterfront land owned by Griffin in Jerusalem on the west side of Point Judith Pond. Upon completion of the condemnation proceedings, the state assumed all leases existing between Griffin and her tenants at the time.

In response to the condemnations, Griffin, through her then attorney, the late James O. Watts, brought three separate actions in Superior Court for the assessment of damages against the state. One action was reached for trial in May of 1947 and resulted in a judgement for Griffin in the amount of $27,475. The state filed a motion for a new trial, after which Griffin instructed her attorney to negotiate a full settlement of her claims regarding all three parcels. Following an extended negotiation period, on March 30, 1948, the state agreed to pay Griffin

$80,100 for her land in exchange for a general release and quitclaim deed, which read in pertinent part as follows.

DEED

"I ELIZA GRIFFIN, of the Town of South Kingstown, County of Washington, State of Rhode Island, for consideration paid, grant to the STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS with Quit-Claim Covenants

"All my right, title and interest in and to any and all land wheresoever located within the limits of condemnation,* *."

RELEASE

"NOW THEREFORE, I J. Eliza Griffin, in consideration of eighty thousand one hundred and 00/100 (80,100.00) dollars to be paid by the State of Rhode Island, the receipt of which is hereby acknowledged,* * * do hereby remise, release and forever quit claim unto the State of Rhode Island all and all manner of actions, causes of actions, debts, dues, claims and demands, both in law and equity, and without limiting the generality of the foregoing, especially for the value of the land taken as aforesaid and any and all damages incident or related to the said taking, which against said Department of Public Works on behalf of the State of Rhode Island, or the said State of Rhode Island ever had now have or ought to have, for or by reason of any matter or thing from the beginning of the world to the day of the date of these presents."

Griffin and the state then went their separate ways until August 19, 1962, when in response to a growing demand for dock space, the state took the last parcel, situated on Little Comfort Island, was designated as lots numbered 6 and 7 on the land plats of Narragansett.

From 1948 the state has utilized the Griffin property condemned in 1946, along with adjacent lands, to develop a port facility. According to the evidence adduced before the trial justice, this development is an ongoing project costing millions of dollars. Among other things, the project has resulted in the construction and repair of bulkheads, piers, roads, parking lots and a sewer system; the dredging and redredging of the harbor; development of a sandy state beach; and the repair and replacement of docks, riprap, and breachway. Additionally, the land in the port area has been used for deposits of spoils from dredging and redredging opera-

tions, for the operation of fish-processing plants, and for the provision of auxiliary services to the commercial fishing fleet, charter-boat fleet, pleasure craft, and ferry to Block Island. Furthermore, the University of Rhode Island makes use of the port facility for its nurseries and its various shell and fish studies, and the Division of Fish and Wildlife maintains a fisheries laboratory on the site.

The auxiliary services alluded to above include not only direct support for the marine industry, such as boat-engine-repair shop, storage facilities, and net-drying areas, but also retail businesses such as restaurants, markets, and a hotel (the Dutch Inn) to serve the boat crews, employees of local industries, and tourists. Because of the improvements made to the port, it has been successful in attracting several major fishing tournaments, including the Atlantic Tuna Tournament, the Swordfish Tournament, and the

Striped Bass Tournament. These and other events have drawn thousands of tourists to the area who are in turn served by the local retail establishments.

Future expansion and development of the port will be guided by a plan prepared by the Coastal Resources Management Council. Improvements will include, among others, the extension of piers, the establishment of additional fish processing plants, the construction of additional facilities to accommodate an expanded commercial fishing fleet, and the possible development of a University of Rhode Island fishing school and fish-industry museum. Ultimately, as funds become available, the Galilee facilities will be made completely available to the commercial fleet, and the area condemned on Little Comfort Island in 1962 will be developed as a marina for pleasure craft.

In explaining the commencement of this suit some twenty-seven years subsequent to

the original condemnations, Griffin testified that she only just became aware of a possible "constitutional right of preemption" in her properties in 1972 when she met her present counsel. In 1973 Griffin filed an action against the Director of the Department of Transportation; in 1974 she file a similar action against the Director of the Department of Natural Resources, now the Department of Environmental Management. Griffin joined both Directors as parties because of an apparent overlap of functions between the two Departments. In G.L. 1956 (1977 Reenactment) 42-17.1-2 (1982 Cumm.Supp.), the Director of Environmental Management is authorized to exercise all the functions and duties previously vested in the former Division of Harbors and Rivers of the Department of Public Works. Likewise, enumerated among the powers granted to the Director of the Transportation Department in 42-13-1 (1982 Cum.Supp.) is the implementation of

programs for port properties and state piers. Consequently, these actions were consolidated for trial and heard before the trial justice in December 1978.

Our attention now shifts to selected issues raised by Griffin and the conclusions of law reached by the trial justice. However, before discussing the merits of the substantive issues before us, we shall first dispose of Griffin's contention that the trial justice erred in vacating a default judgement entered against defendant on February 2, 1973.[1] Chronologically, the following sequence of events occurred. Griffin instituted the instant action by a summons and sworn complaint dated January 9, 1973, and served upon the then Director of Transportation, Robert J. Rahill. No entry of appearance was filed on behalf of Rahill, nor did he plead or defend as provided by the rules. Consequenty, Griffin, pursuant to rule 55 of the Superior Court Rules of Civil

Procedure, applied for and was granted a default judgement. On February 15, 1973, Rahill filed a motion to vacate the default judgment and to extend the time to answer. This motion was granted by the court on March 23, 1973, over Griffin's objection. The trial justice vacated the default judgment because he found that the complaint served upon the Director of Transportation had been mislaid during a period of change between administrations and further that the Attorney General was unaware of the fact that suit had been instituted.

Griffin maintains that the trial justice erred by vacating the default judgment in the absence of an affidavit of meritorious defense under rule 60(b). We disagree. The record indicates the prior to entry of the default judgment, the Attorney General, an indispensable party to this action, had not been served with the complaint. General Laws 1956 (1959

Reenactment) 9-30-11. We have said on numerous occasions that rules relating to service of process must be followed and construed strictly. Plantations Legal Defense Services, Inc. v. O'Brien, R.I., 413 A.2d 486 (1980); Rosen v. Rosen, R.I., 404 A.2d 472 (1979); Shannon v. Norman Block Inc., 106 R.I. 124, 256 A.2d 214 (1969); See also Langton V. Demers, R.I. 423 A.2d 1149 (1980). Here failure adequately to serve the Attorney General effectively voided any default judgment entered. Under these circumstances, there is nor necessity to make a showing of meritorious defense under the rule because the movant has an "unqualified right to relief." Shannon, 106 R.I. at 132, 256 A.2d at 219. Consequently, the trial justice's actions in this instance were proper.

Having disposed of this preliminary matter, we turn to the constitutional challenges posed by Griffin. Regarding the

property in Galilee and Jerusalem, Griffin maintains that the taking provision in effect at the time, namely, G.L. 1938, 27, as amended by P.L. 1945, ch. 1650, was unconstitutional as an invalid delegation of legislative power. Griffin also alleges that the condemnations were not for the "use and benefit of the public" as required by the statute and that the condemnations represented an unreasonable, arbitrary, and capricious taking of private property in bad faith in violation of the United States and Rhode Island Constitutions. Concerning the latter contention, Griffin insists that the state took more land than was necessary for the purposes set forth in the statute. Furthermore, Griffin maintains that she has a constitutional right of preemption as guaranteed by article XVII of the amendments to the Rhode Island Constitution. In particular, she charges that the existing leases pertaining to her former properties are illegal and

void because the state failed to offer her the properties prior to leasing them the third parties.

With regard to the property condemned on Little Comfort Island in 1962, Griffin alleges that the taking was similarly unreasonable, arbitrary, and capricious and that it exceeded the authority delegated by statute, thereby violating Federal and State Constitutions.

At the outset, we hasten to point out that except for the reason delineated below, we would ordinarily decline to reach the constitutional questions raised pertaining to the 1946 condemnations because of the general release and quitclaim deed signed by Griffin. The deed quitclaimed all of Griffin's "right, title and interest" to the properties, and it contained no express limitations on the estate conveyed. Under our statutes, absent specific mention of an excepted or reserved right or interest, the conveyance

passes all rights, including future interests, appertaining to the land. General Laws 1956 (1969 Reenactment 34-11-4, -28, 34-4-11. As far as the release was concerned, by its clear and unambiguous language, Griffin was to forfeit "forever" all "manner of actions, cause od actions, debts, dues, claims and demands" against the state arising from the taking of her land and "any and all damages" related to the taking.

On past occasions, we have specified the conditions under which a release, valid on its face, may beset aside. In Boccarossa v. Watkins, 112 R.I. 551, 312 A.2d 135 (1973), a personal-injury action, we reiterated the rule that an executed release of a claim is valid absent an affirmative showing that the release was obtained by fraud, misrepresentation, an overreaching on the part of one of the parties, or a showing that a material mistake has occurred. Id. at 554-55, 313

A.2d at 136-37. Our rationale in adopting this rule was that settlements serve a valuable function by disposing of controversies before they enter the court system, thereby relieving the congestion on our dockets and calendars. If releases were taken lightly and rescinded, the incentive to settle would dissipate and parties opting for such a course could never be secure from litigation. "Finality has its virtue." Id. at 557-58, 313 A.2d at 138.

We can discern no reason why this rule should not equally apply in the present situation. The record reveals that Griffin was well represented by a distinguished and learned counsel who testified that Griffin understood the documents she signed. Griffin was both a highly educated person with a professional degree and a astute businesswoman who managed in excess of fifteen different parcels of property. Given these circumstances, we are convinced

that the release was not obtained by fraud, misrepresentation, or mutual mistake.

Parenthetically, we note that Griffin is questioning the constitutionality of the very statute that she previously invoked to exact her remedy. Similar challenges have been routinely rejected by this court in the past. See, e.g., Lynch v. King, 120 R.I. 868, 875. 391 A.2d 117, 121 (1978); DePrete v. Farm Bureau Mutual Automobile Insurance Co., 83 R.I. 10, 12, 111 A.2d 837, 838 (1955). Ordinarily, such a procedural posture would serve as an absolute bar to Griffin's actions.[2]

Although this case might have been dismissed on the grounds discussed above, we find it necessary to reach several of Griffin's constitutional contentions because of certain rulings made by the trial justice and their effect upon the 1962 condemnation, their impact on pending lawsuits, and the great weight and importance that we ascribe to these issues.

We do so, keeping in mind the well-settled principle that this court will not pass on the constitutionality of a statute on a broader basis than required by the circumstances. State v. Peloquin, R.I. 427 A.2d 1327, 1329 n.6 (1981). Griffin's charge that her land was not taken for public purpose because some of it has been leased to private concerns is unwarranted. It cannot be seriously contended that the development and operation of the port as described above is not a public facility serving a public use or purpose. The trial justice found that any benefits accuring to private businesses were incidental to the benefits derived by the public. We concur with this assessment. The public nature of a project is not eradicated because private enterprise becomes involved. In Romeo v. Cranston Redevelopment Agency, 105 R.I. 651, 660-61 254 A.2d 426, 432 (1969), we echoed the sentiments expressed in Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99

L.Ed. 27 (1954), rejecting an argument similar to the one advanced by Griffin that a taking was unconstitutional because the land was put to private rather than public use. In Berman the Court ruled that once a public purpose had been established, the means of executing the project was for the Legislature to decide. "The public end may be as well or better served through an agency of private enterprise than through a department of government * * *." Id. at 33-34, 75 S.Ct. at 103, 99 L.Ed. at 38.

With regard to what constitutes a "public use", we have said that that this is a judicial question that may not be given a "rigid, unbending, absolute definition." Romeo, 105 R.I. at 658, 254 A.2d at 431. Views on this issue necessarily vary with the changing conceptions of the functions and scope of government. "The modern trend of authority is to expand and liberally construe the meaning of "public use." Id. See

also Opinion to the Governor, 113 R.I. 586, 594 324 A.2d 641, 646 (1974); Opinion to the Governor, 112 R.I. 151, 155, 308 A.2d 809, 811 (1973).

Furthermore in Opinion to the Governor, 113 R.I. at 594, 324 A.2d at 646, it was stated that if the principles purposes and objectives set out in legislative enactment are public in nature, incidental benefits to private interests are not controlling. According to the record before us, the purposes guiding the development of the port facilities include the improvement of navigation, promotion of the fishing industry, enhancement of recreation, and encouragement of tourism. The uncontradicted evidence establishes that the economic activity generated by the port translates into millions of dollars and hundreds of jobs. We can scarcely label these purposes and results as primarily "private" rather than "public" in nature.

Griffin also complains that the former Department of Public Works exceeded its statutory authority when it condemned her properties. That department was authorized in 27 of chapter 1650 of the Public Laws 1945 to condemn "any portion of real property, tide flowed lands * * riparian and littoral rights * * * bordering on tidewater in the state and as much of the uplands adjacent thereto as the director of public works deem expedient."

To prevail on this issue, Griffin's burden was to show that the condemning agency "exceeded its delegated authority by an arbitrary, capricious or bad faith taking of private property." Romeo, 105 R.I. at 665, 254 A.2d at 434. No evidence exists in the record to suggest that the state even remotely acted in such a manner in the instant case. To the contrary, the port's development over the last thirty-five years has confirmed the foresight of the condemning agency's

original actions. Concerning the Little Comfort Island land, the fact that the state has not yet dredged it because of the present lack of funds in no way justifies the characterization of the original taking as capricious or arbitrary. Development of this land will eventually proceed according to a well formulated plan designed to maximize the economic potential of the area.

We shall next consider Griffin's claim that the state violated her constitutional right of preemption under article XVII of the amendments to the Rhode Island Constitution. In pertinent part, article XVII reads as follows:

> "Acquisition of excess land by public agencies.-The general assembly may authorize the acquiring or taking in fee by the state, or by any cities or towns, of more land and property than is needed for actual construction in the establishing, laying out, widening, extending or relocating of public highways, streets, places, parks or parkways * * *. After so much of the land and property has been appropriated for such public highway, street, place, park or parkway as is needed therefore, the remainder may be

> held and improved for any public purpose or purposes, or may be sold or leased for value with or without suitable restrictions, and in case of any such sale or lease, the person or persons from whom such remainder was taken shall have the first right to purchase or lease the same upon such terms as the state or city or town is willing to sell or lease the same."

Relying upon this constitutional provision, Griffin maintains that the state should have first offered her the opportunity to rent or lease her condemned land before offering it to third parties. She advances an equal protection argument in support of her position in that the port facilities come within the ambit of article XVII. The trial justice agreed that article XVII was applicable to the condemnations of Griffin's property but held that she had waived or conveyed her rights to the 1946 properties when she signed the release and was therefore estopped from claiming them at this time. However, with respect to the property condemned in 1962, the trial justice ruled that Griffin retained the first right to

purchase or lease the property if the state chose ever to sell or lease it in the future.

After careful examination of the amendment's text and its historical background, it is our considered opinion that the trial justice was mistaken in holding that article XVII was applicable in the instant matter. By its terms, the amendment applies only to the taking of land used for "public highways, streets, places, parks or parkways." When construing constitutions, one must give the words their usually accepted meaning. Bailey v. Baronian, 120 R.I. 389, 391, 394 A.2d 1338, 1339 (1978). Keeping this guideline in mind, we can comfortably state that the term "port" does not appear in the language cited, nor can its presence be inferred by any stretch of the imagination. It seems to us that the term "place", read in the context of the clause in which it appears, refers to a court or square or

short street. This result is in accord with the rule of construction that a general term in a list of specific terms should be considered as limited by the more specific terms. Montaquila v. St. Cyr, R.I. 433 A2d 206, 214 (1981). It is also in accord with the marginal note to chapter 1224 of the 1915 Acts of the General Assembly approving the proposed amendment for submission to the voters as article XVII, which note mentions "Excess condemnation of land for highway or park purposes." (Emphasis added.)

Viewing the amendment to "examine the state of things existing when it was framed and adopted," Bailey v. Baronian, 120 R.I. at 392, 394 A.2d at 1339, lends further support to our ruling. The amendment was promulgated at a time in which literal and very restrictive meanings were given to the phrase "public use." Romeo v. Cranston Redevelopment Agency, 105 R.I. at 658-59, 254 A.2d at 431. Such

restrictive readings were given rise to claims for damages from construction activities incidental to the building of highways and railroads. For instance, a town or its agents could be found guilty of trespass during the reconstruction of a road if there was an entry upon the lands of an adjacent property owner. Chapman v. Pendleton, 34 R.I. 160, 169, 82 A. 1063, 1067 (1912). Construction activities were consequently confined to the roadbed, thereby hampering efficient road-building methods. In reaction to these restraints, the Legislature in 1914 drafted Article XVII.

It is significant to note that at the time the amendment was enacted, public agencies were authorized to acquire properties by eminent domain for a variety of projects. In particular, four years prior to the submission of the amendment to the voters, the Legislature has enacted P.L. 1910, ch. 568, authorizing the

acquisition of real property by eminent domain for the construction of port facilities in several cities. The Legislature, if it had so desired, could have expressly included a reference to port facilities in the language of the amendment. Such a conscious decision was made with respect to parks and parkways. The absence of any such reference consequently evidences and intent not to include such facilities within its ambit. See State v. Feng, R.I., 421 A.2d 1258, 1264 (1980.

Our ruling that port facilities are outside the scope of article XVII necessarily invalidates the trial justice's declaration that G.L. 1956 (1980 Reenactment) 46-5-15 is unconstitutional. That chapter entitled "Construction of Port Facilities" authorizes the Director of Environmental Management to lease or sell land acquired under but no longer required for the purposes set out in the statute,

provided that the original landowner(s) are offered a prior right to lease, purchase, or reinvest themselves of such land. The director's authorization to lease or sell the land to the original landowners is subject to specific time and other restrictions. The trial justice was of the opinion that these restrictions impinged upon the constitutional right to preemption guaranteed by article XVII. He consequently declared the statute unconstitutional.

The trial justice overlooked the fact that the statute that tracks article XVII is not 46-5-15 but rather G.L. 1956 (1977 Reenactment) 37-7-4 pertaining to the reinvestment in original landowners of property taken for streets and parks. Indeed, the language used in 37-7-4 referring to "highways, streets, places, parks or parkways" is identical to the language used in the amendment. Consequently, the trial justice erred in

applying 46-5-15 to article XVII, and his declaration that the statute is unconstitutional must be set aside.

Accordingly, for the reasons stated above, the state's appeal is sustained and Griffin's appeal is denied in its entirety. So much of the judgment that finds the preemption rights guaranteed by article XVII applicable to land taken for the construction of port facilities is hereby vacated as it that portion declaring 46-5-15 unconstitutional. The record in this case is remanded to the Superior Court for entry of a new judgement in accordance with this opinion.

FOOTNOTES

1. We declined to rule on this question in Griffin v. Rahill, 112 R.I. 549, 313 A.2d 374 (1973), because, at the time, the action of the trial justice in granting the motion to vacate was nonappealable as an interlocutory order. Id. at 550, 313 A.2d at 374.

2. We also note that the doctrine of laches, had it been raised as an affirmative defense at trial, might also have estopped Griffin from bringing this action at the present time.

resemble statutory entitlements to which federal courts have extended Fourteenth Amendment protection. See Fuentes v. Shevin, 407 U.S. 67 (1972). Such factors as whether plaintiff's waiver was "knowing", whether she was aware of the significance of the waiver, whether there was some kind of fair exchange for the rights released, and whether she understood the legal consequences of her actions will have to be considered should it be necessary to consider plaintiff's constitutional claims. See Overmeyer v. Frick, 405 U.S. 174 (1972) and Swarb v. Lennox, et al, 405 U.S. 191 (1972).

FILED
AUG 29 1985
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No. 85-74

In The

Supreme Court of the United States

October Term, 1985

JULIA ELIZA GRIFFIN,

Petitioner,

v.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS; DANIEL J. RYAN, Individually and in his former capacity as Director of Public Works; FRANK M. O'DONNELL, Individually and in his former capacity as Chief of the Division of Harbors and Rivers; HENRY ISE, Individually and in his former capacity as Chief of the Division of Harbors and Rivers; EDWARD C. HAYES, JR., Individually and in his former capacity as Director of the Department of Natural Resources; DENNIS J. MURPHY, JR., Individually and in his former capacity as Director of the Department of Natural Resources; WILLIAM W. HARSH, Individually and in his former capacity as Director of the Department of Environmental Management; WENDALL J. FLANDERS, Individually and in his capacity as Director of Transportation; and W. EDWARD WOOD, Individually and in his capacity as Director of the Department of Environmental Management,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A brief factual history, and the course of the proceedings leading to the granting of Respondents' Motion for Summary Judgment, were set out in Respondents' Statement of Undisputed Facts. Said statement was filed pursuant to Local Rule of the District Court, as a part of Defendants' Motion to Dismiss and/or for Judgment on the Pleadings and for Summary Judgment, and it was uncontroverted by Petitioner. It said,

> "Defendants contend that there is no genuine issue necessary to be litigated as to the following material facts.
>
> In 1946, the State of Rhode Island condemned certain property owned by plaintiff in Galilee, Town of Narragansett. Subsequent to said condemnations, plaintiff brought suit in Rhode Island Superior Court. After trial in one of the cases, plaintiff and the State entered into a comprehensive settlement by which the plaintiff conveyed all of the condemned property to the State by quit claim deed in exchange for the payment of $80,100 plus a building. In addition, as a part of said settlement, plaintiff on March 30, 1948, executed a release of all claims arising from the taking of her properties. In 1962, the State condemned a final parcel owned by the plaintiff. The pertinent factual details of the various transactions of the parties are accurately set out in the Rhode Island Supreme Court slip opinion at pages 2 through 6.
>
> Plaintiff, in 1973 and 1974, commenced two actions (which were subsequently consolidated) in Providence County Superior Court, which sought to have the Court determine that the State, by taking her properties, had violated her Fifth and Fourteenth Amendment Rights under the U.S. Constitution as well as certain rights allegedly accruing to her under the Rhode Island Constitution and Rhode Island Gen-

eral Laws. She asked that she be revested with title to the properties, that the State be required to account for all income which had flowed from its ownership of the properties, and for damages. The cases were tried before the Honorable Judge John P. Bourcier, sitting without a jury, who rendered a decision and entered a judgment on June 15, 1979. Plaintiff thereafter appealed the Superior Court decision to the Rhode Island Supreme Court.

Plaintiff then filed the federal action, herein, and the Court deferred action, pending the decision of the Rhode Island Supreme Court.

On August 4, 1983, the Rhode Island Supreme Court issued an opinion in which it ruled that "the State's appeal is sustained and Griffin's appeal is denied in its entirety."

In addition, Respondents' wish to correct certain items in Petitioner's Statement of the Case.

At page 7, Petitioner asserts that some sort of oral communication, in conference, was given to an Associate Justice of the State Supreme Court. She also claims that "as a result" the state filed a motion to dismiss. Respondents specifically deny both assertions, and suggest there is no evidence on which to base either contention.

At page 9, Petitioner continues to claim, despite the unequivocal language of her State court briefs, and the decision of the Rhode Island Supreme Court, that federal constitutional issues were not briefed nor decided. The record couldn't be any clearer that the Fifth and Fourteenth Amendment issues were both briefed and decided.

Finally, to correct the first paragraph on page 12 of the petition, the motion which led to the District Court's summary judgment was actually a renewal of the Mo-

tion originally filed in September, 1981. The earlier Motion had been stayed by Judge Boyle pending a decision by the Rhode Island Supreme Court in Petitioner's state court action. In addition, it was based not only on the res judicata argument, but also on the contentions that the Complaint failed to state a claim because it was commenced beyond the applicable statute of limitations (or because Plaintiff was guilty of laches), because Plaintiff had executed a full release as to all claims arising from the incident complained of, and because she had voluntarily, after extensive negotiations, deeded the subject properties to the State. Petition P. A-36, foot note 1.

—o—

ARGUMENT

Introduction

Petitioner seeks to rely on Rule 17.1(c) of the Rules of the Supreme Court in her request that a Writ of Certiorari issue, asserting that the First Circuit's decision, below, is "in conflict with applicable decisions of this Supreme Court". (Petition, p. 15). In response, it is submitted that the First Circuit (as did the District Court) explicitly applied the controlling Supreme Court decisions in a manner entirely consistent with their teachings.

The factual background giving rise to this action is set forth in the Rhode Island Supreme Court decision involving the same parties, at pages A-110-119 of the Petition.

The Court of Appeals Examined Rhode Island State Law Concerning Res Judicata To Reach Its Result In A Manner Entirely Consistent With This Court's Instruction in Migra

Though petitioner asserts that the Court of Appeals' decision conflicts with this Court's instruction in *Migra v. Warren City School District Board of Education*, 465 US 75, (1984) a reading of the First Circuit's decision makes evident that it faithfully adhered to *Migra* by examining and applying Rhode Island preclusion law. It discussed the principles enunciated in the three controlling Rhode Island Supreme Court cases concerning res judicata and collateral estoppel to conclude that the state court would have summarily disposed of a subsequent action of the type petitioner has sought to prosecute in federal court.

The essence of petitioner's argument is not really that the First Circuit decision conflicts with *Migra*, but rather that the First Circuit came to an incorrect conclusion regarding Rhode Island preclusion law. Petitioner appears to be arguing that the phrase "cause of action" has a narrow meaning, enunciated in the *Migra* decision, which the First Circuit did not perceive. Respondents submit that *Migra* did not attempt to distinguish between a "cause of action" or a "claim", or to define any of the several other similar terms utilized by various courts ("matters", "issues", "grounds", "demands", "claims for relief", "theories of recovery", "counts", "rights of action"), but rather admonished the federal courts to apply state law preclusion doctrines. The Court of Appeals did precisely this,

> However, appellant contends that the "cause of action" in Rhode Island and federal courts differed,

> and thus argues that res judicata does not bar her federal court action. We disagree. An analysis of the cause of action here and in the prior state proceedings clearly establishes that both are essentially the same.
>
> Petition, p. A-6.

The First Circuit's conclusion is consistent with those of all three Rhode Island Federal District Court judges. *Schiavulli v. Aubin*, 504 F. Supp. 483, 485-86 (Pettine, J., 1980); *Gonsalves v. Alpine Country Club*, 563 F.Supp 1283, 1287-88 (Selya, J., 1983); *Griffin v. State of Rhode Island*, (Boyle, J., 1984); petition, pp. A-19-24. In each case, the Court concluded that Rhode Island's application of res judicata was the conventional, modern approach utilized in the federal system.

Petitioner has now sought to recharacterize her state court action as one for the "fraudulent condemnation of her property", in an apparent attempt to distinguish it from a new cause of action pursuant to 42 USC § 1983. This new description of her state court complaint is an egregious misstatement of two 12 page complaints, each alleging that the Fifth and Fourteenth Amendments to the U.S. Constitution had been violated, that her property had not been taken, nor used, for a public purpose, and that the Rhode Island Constitution and state statutes had been violated by the State's refusal to reconvey the property. Note the First Circuit's comment on her state action p.A-3 of the petition, the R.I. Supreme Court's summary of her contentions at pp.A-122-123 of the petition, and the District Court's summary of her state court claims at pp.A-11-12 of the petition. Until the filing of the petition, herein, there had been no allegation of fraud.

Respondents suggest that this recent recharacterization of petitioner's theory of recovery is similar to that which she attempted by filing a section 1983 action in federal court after having litigated her state court actions to judgment. Petitioner apparently believes that so long as she can affix a new label to her same disagreement with the respondents, she is entitled to commence another lawsuit in either state or federal court. This is an obviously absurd proposition, for which no basis exists in Rhode Island law.

Even assuming, *arguendo,* that, the First Circuit was mistaken in its application of Rhode Island preclusion law, such is not a basis for this court's exercise of jurisdiction pursuant to a writ of certiorari. This Court has not rendered any decisions concerning Rhode Island res judicata law with which the Court of Appeals' decision might arguably be in conflict. This Court has far more important matters to address, it is submitted, than whether the lower federal courts accurately understood and applied Rhode Island preclusion law.

The Lower Court's Determination That The England Reservation Rule Did Not Apply To The Petitioner Is Entirely Consistent With This Court's Decisions

This Court established the general rule regarding reservation, when it said,

> We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the State Courts, litigates them there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forgo his right to return to the District Court.

England v. Louisiana Medical Examiners, 375 U.S. 411, 419, (1964).

Petitioner contends that she effectively reserved a right to have the federal court decide her federal claims under the *England* reservation doctrine. The First Circuit, however, held that "England is not applicable to this case." (Petition, p.A-8.) It is submitted that this determination conflicts with no decision of the Supreme Court.

Unlike the situation in *England,* the petitioner here commenced her actions in state court, alleging federal constitutional violations as well as state claims, litigated them, received an adverse decision on them, and then filed her action in federal court. Even after the final trial court decision and the filing of her appeal, she never explicitly communicated a desire to have the State Supreme Court rule on only state issues. Certainly, the Rhode Island Supreme Court was unaware of any claimed reservation. Petitioner's Notice of Appeal to the Rhode Island Supreme Court referred to all of her trial court claims, (including the federal ones), she briefed her federal claims in her appeal to the Rhode Island Supreme Court, and the Rhode Island Supreme Court decided her federal claims. Petition, pp.A-127-128)

Moreover, petitioner's putative written reservation occurred almost four years after having received an adverse decision by the state trial court, after submittal of all briefs to the Rhode Island Supreme Court, and on the eve of oral argument before it. She points to the following language, which is the second of three points raised in an Objection to the Defendants' Request That the Date For Oral Argument Be Continued.

> "2. This matter is of great importance to plaintiff as well as the defendants, and the decision of this Supreme Court also has a bearing on the suit that plaintiff has pending in the United States District Court for the District of Rhode Island. Trial in the Federal Court has been deferred, pending the decision of this Supreme Court, as this Court's decision will be a determining factor in what issues will have to be decided by the Federal Court."

This is the language upon which the Petitioner relies to contend that she had complied with the *England* requirement that a plaintiff inform the state court of his intention to return to Federal Court on his federal claims.

It is submitted that the plain language of this statement cannot reasonably be construed as notice to anyone that Petitioner wished to withdraw her federal claims from consideration by the Rhode Island Supreme Court, assuming she could do so. Rather, it implicitly conceded that the state court may decide all of the issues on which she took an appeal, but that if it doesn't, she will seek to return to federal court for a determination of those upon which the state court declined to rule. The intention of the statement was, of course, to argue against a delay in oral argument, not to request that the state court abstain from ruling on federal claims. Petitioner acknowledges that "she was not even aware of the reservation rule" (Petition, p.A-11), at the time she now contends she communicated the same to the state court.

However, even assuming that petitioner had communicated her request that the Rhode Island Supreme Court not rule on her federal claims, the "reservation" was neither timely made, nor within the rationale of *England*. *England* dealt with a situation in which a federal plain-

tiff had initially commenced an action in federal court, and was thereafter remitted to state court by operation of the federal abstention doctrine. The rationale which the *England* Court relied on, in part, in permitting the plaintiff to return to federal court after the adverse state decision was that a plaintiff who had initially and deliberately chosen the federal forum ought not to be prevented from having the primary fact finding determination on any reserved federal issues made by the federal court.

In the matter, herein, on the other hand, the plaintiff deliberately and initially chose the state court as the fact finder. It was not until six years after she commenced her state court action, apparently dissatisfied with the findings and decision of the state trial court, that she commenced her federal action.[1] The deferral by the Federal Court, to allow the Rhode Island Supreme Court to render its decision, did not result in the state court becoming the primary fact finder. That fact finding process had already occurred, several years earlier, solely as a function of plaintiff having initially chosen the state court forum and presenting both her state and federal claims to it.

That *England* only applies to situations where a plaintiff initially chose a federal forum was made explicit by this Court's decision in *Allen v. McCurry,* when it said:

> The holding in *England* depended entirely on this Court's view of the purpose of abstention in such a case: where a plaintiff *properly invokes federal-court*

---

[1] As Judge Boyle correctly pointed out, a trial court decision is a final judgment for purposes of res judicata, under Rhode Island law. Petition, p.A-24-25.

> *jurisdiction in the first instance on a federal claim,* the federal court has a duty to accept that jurisdiction. (Emphasis added) *Allen v. McCurry,* 449 U.S. 90,101, footnote 17 (1980)

Other federal courts have understood *Allen* to narrow what was arguably a broad rule laid down in *England.*

> However, *Allen v. McCurry,* (citation omitted) expressly limits *England's* application to situations where the federal court's jurisdiction was initially invoked and properly preserved before initiating a second proceeding in State Court. *Redd v. Lembert,* 674 F.2d 1032, 1034 (5th Cir. 1982)

It is submitted that the petitioner's reliance on the language from *Migra,* which refers to the *England* reservation procedure, is inapposite to the proceedings here. More on point is the following language from *England.*

> "But we see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. Such a rule would not only countenance an unnecessary increase in the length and cost of the litigation; it would also be a potential source of friction between the state and federal judiciaries." *England* at 419.

The Court of Appeals' holding that *England* was not applicable was clearly correct, and consequently no conflict exists which might serve as the basis for an exercise of this Court's jurisdiction pursuant to Rule 17.1(c).

———o———

CONCLUSION

It is respectfully requested that the Petition be denied, and/or that a summary disposition on the merits be entered in Respondents' favor.

Respectfully submitted,

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